EXPERT WITNESS DISCOVERY VERSUS THE WORK PRODUCT DOCTRINE: CHOOSING A WINNER IN GOVERNMENT CONTRACT LITIGATION

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INTRODUCTION

Before an expert witness ever takes the stand at trial, the attorney who will cross-examine the expert has already made some attempt to discover the information underlying the expert's testimony (unless the attorney wants to actually *use* his or her malpractice insurance). In the federal courts, expert witness discovery is guided by the subdivisions of the federal rule addressing expert discovery, Federal Rule of Civil Procedure 26.

Typically, the discovery process begins with the party who intends to offer expert witness testimony at trial providing the identity of the party's testifying expert to the opposing party.[1] Anyone identified as a testifying expert prepares a written report stating the opinions to which the expert will testify, the bases of the opinions, and the data used in forming the opinions.[2] The

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[1] FED. R. CIV. P. 26(a)(2)(A):

> . . . a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

Interestingly, FED. R. CIV. P. 26(a)(2)(A) is written broadly enough to require the disclosure of the identity of non-expert witnesses, as evidence presented under FED. R. EVID. 703 could be presented by lay witnesses, as well as by expert witnesses. (See note 258 for the text of FED. R. EVID. 703.).

[2] FED. R. CIV. P. 26(a)(2)(B):

> . . . this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case . . . be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; [and summaries, qualifications, publications, compensation, and a listing of previous testimony given].

opposing party then takes the testifying expert's deposition,[3] and asks at deposition if the expert was given any materials concerning the case other than those listed in the expert's written report.[4] The attorney defending the deposition says, to opposing counsel, "Objection, the expert's report lists what information the expert relied upon; anything else the expert might've been given is work product," and then to the expert witness, "Don't answer the question." Opposing counsel says, "I have a right to know everything your expert considered in forming the opinions you want to present; if you gave your expert work product to review, that's your problem--let's get the judge on the phone right now and take care of this."

What will the judge say? For the federal courts, it is not a question of first impression. Repeatedly, the federal courts have addressed the conflict between the full discovery of all information shared with a testifying expert witness and the protection applied to attorney work product. The primary government contract litigation forums, the Court of Federal Claims and the boards of contract appeals, have also wrestled with issues related to the

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[3] FED. R. CIV. P. 26(b)(4)(A):

> A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

[4] The deposing attorney may not ask this question if the deposing attorney expects his or her opponent to reciprocate by also not asking the question of the deposing attorney's expert witness. Judging by the practice of most attorneys, the "golden rule" of discovery appears to be: "Do unto others as you would have them do unto you--unless it is too late for them to do unto you or they don't have the wherewithal to do unto you. Then, by all means, do unto others as much as you can get away with."

conflict, but their opinions do not deal as directly with the question, nor are they as numerous as those of the federal courts.

This paper will outline the battle between the full disclosure of information shared with an expert witness and the protection of work product, and will argue the government contract litigation forums should resolve the conflict by ordering full disclosure. This paper will examine the following:

The Work Product Doctrine. This paper will begin with a short look at the work product doctrine and the doctrine's inclusion in Federal Rule of Civil Procedure 26, and will discuss how expert witnesses become involved with work product.

The Federal Courts: Discovery of Work Product Shared With an Expert Witness. Next, the treatment given expert witness discovery and work product by the federal courts will be explored in detail, with particular attention given to the courts' reasoning, since similar reasoning may be applied in the government contract litigation forums. Federal Rule of Civil Procedure 26 will be examined, and the reasoning of the federal courts will be divided into the two time periods relevant to Federal Rule 26: pre-1993 Amendments (the "old" rules), and post-1993 Amendments (the "new" rules).

The Government Contract Forums: Discovery of Work Product Shared With an Expert Witness. After looking at the treatment given expert witness discovery by the federal courts, the approaches taken by the federal courts will be compared to the less frequently traveled paths followed by the Court of Federal Claims and the boards of contract appeals.

How Government Contract Forums Should Resolve the Conflict. Finally, this paper will conclude by providing arguments for why the Court of Federal Claims and the boards of contract appeals should choose full disclosure of information shared with an expert witness over the protection of attorney work product. This conclusion will be supported by an examination of the differences between expert witness testimony and fact witness testimony, as well as the special considerations given expert testimony by the Federal Rules of Evidence, and the differences between testifying experts and nontestifying experts (and the special protection given communications with nontestifying experts).

I. THE WORK PRODUCT DOCTRINE

One of the surest methods of pausing, if not stopping, a line of deposition questions is to say: "Objection, calls for attorney work product." Attorney work product is treated as almost sacred ground. The Supreme Court provided its sacrosanct text defining attorney work product in *Hickman v.*

Taylor, 329 U.S. 495 (1947). *Hickman* held "written materials obtained or prepared by an [attorney] with an eye toward litigation" are protected as attorney work product.[5] Work product also encompasses communications that contain the mental impressions of an attorney,[6] though facts alone are not attorney work product.[7]

In *Hickman*, the Supreme Court's rationale for protecting attorney work product had as its foundation the interest of allowing an attorney to work on developing his or her case without fear that opposing counsel could acquire his or her work. If attorney work product was discoverable, the court said:

> An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[8]

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court stated the work product protection it enunciated in *Hickman* was

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[5] *Hickman v. Taylor*, 329 U.S. at 511. As is pointed out in *Ed A. Wilson, Inc. v. Gen'l Serv. Admin.*, GSBCA No. 12596, 94-3 BCA ¶ 26,998 at 134,491, protection for work product is a qualified immunity rather than a privilege. This distinction may produce different results in cases of inadvertent disclosure, as discussed in *Ed A. Wilson* at 134,492.

[6] *Hickman*, 329 U.S. at 512.

[7] *Id.* at 507, 511-13; *In re Murphy*, 560 F.2d 326, 336 n.20 (8th Cir. 1977). Regarding expert witness discovery, the two key cases supporting the protection of work product given to an expert witness also acknowledge facts are not work product. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984) states "where the same document contains both facts and legal theories of the attorney, the adversary party is entitled to discovery of the facts." *Haworth v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D.Mich. 1995) says factual information must be produced.

[8] *Hickman*, 329 U.S. at 511.

"substantially incorporated in Federal Rule of Civil Procedure 26(b)(3)."[9] Whereas *Hickman* covers communications that are not reduced to any tangible form, Federal Rule of Civil Procedure 26(b)(3) specifically refers only to "documents and tangible things."

A. Opinion Versus Ordinary Work Product

"Opinion" work product is encompassed (when contained within tangible items) by the second sentence of Federal Rule of Civil Procedure 26(b)(3), and is any item prepared in anticipation or preparation of litigation containing the mental impressions, conclusions, opinions, or legal theories of an attorney.[10] "Ordinary" work product is encompassed by the first sentence of Federal Rule of Civil Procedure 26(b)(3) (again, when contained within tangible items), and is any item prepared in anticipation or preparation of litigation which does *not* contain the mental impressions, conclusions, opinions, or legal theories of an attorney.[11]

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[9] *Upjohn Co. v. United States*, 449 U.S. at 398.

[10] *Hickman*, 329 U.S. at 511-12; *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 335 (4th Cir. 1992). Opinion work product can be further subdivided into categories of direct and indirect, and tangible and intangible. Waits, *Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 OR. L. REV. 385, 424-27 (1994). Waits points out that, read literally, Rule 26(b)(3) only protects opinion work product when it is buried within something containing discoverable ordinary work product. Waits, *supra*, at 395. (In spite of Waits undoubtedly accurate assertion that "[t]he major problem with opinion work product is that courts and commentators have treated it monolithically" (Waits, *supra*, at 388), for the purposes of this paper, monolithic treatment will suffice. For comprehensive coverage of opinion work product, read her article.).

[11] *Bohannon v. Honda Motor Co. Ltd.*, 127 F.R.D. 536, 538-39 (D.Kan. 1989).

Federal Rule of Civil Procedure 23(b)(3) gives opinion work product more protection from discovery than the protection afforded ordinary work product. Ordinary work product is discoverable under subdivision (b)(3) if the party seeking discovery can show two requisites: (1) the party "has substantial need of the materials in the preparation of the party's case," and (2) "the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[12] But even if a party can meet the test for discovering *ordinary* work product, under subdivision (b)(3), *opinion* work product is still protected: "In ordering the discovery of [ordinary work product] when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney. . . ."[13] *Upjohn* also highlights the difference between the protections afforded opinion work product and ordinary work product under subdivision (b)(3), stating an attorney's mental processes "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship."[14]

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[12] FED. R. CIV. P. 26(b)(3) (text at note 23). The expert witness discovery case *B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of New York, Inc.*, 171 F.R.D. 57, 63 n.5 (S.D.N.Y 1997), addresses the differences in protection found in FED. R. CIV. P. 26(b)(3) for ordinary and opinion work product.

[13] FED. R. CIV. P. 26(b)(3) (text at note 23).

[14] *Upjohn*, 449 U.S. at 401.

Government contract cases contain the same classifications of work product as the federal court cases, and have no distinguishing quirks.[15] In fact, the Court of Federal Claims' Rule 26(b)(2) is substantively the same as Federal Rule of Civil Procedure 26(b)(3),[16] and therefore contains the same differing protection for opinion and ordinary work product.

B. Expert Witnesses and Opinion Work Product

The federal court cases addressing the discovery of work product shared with an expert witness maintain the distinction between opinion work product and ordinary work product, as do the government contract cases related to the discovery of work product. Expert witnesses both generate and review information which meets the Federal Rule of Civil Procedure 26(b)(3) definition of opinion work product. In anticipation of litigation and at the direction of attorneys, expert witnesses frequently prepare reports,[17] do studies, write memoranda, and provide advice. They also review information generated or selected by attorneys, such as witness preparation checklists, compilations of documents, and case summaries. Neither do attorneys merely listen to their expert witnesses; they also talk to them, providing

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[15] See *Herman B. Taylor Constr. Co. v. Gen. Servs. Admin.*, GSBCA Nos. 12915 and 12961, 96-1 BCA ¶ 27,958; *B.D. Click Co., Inc.*, ASBCA Nos. 25609 and 25972, 83-1 BCA ¶ 16,328; and *Deuterium Corp. v. United States*, 19 Cl. Ct. 697 (1990).

[16] *Deuterium*, 19 Cl.Ct. at 700 n.3.

[17] In jurisdictions following the mandatory disclosure provisions of the "new" rules for expert witnesses, testifying experts are required under FED. R. CIV. P. 26(a)(2)(B) (text at note 2) to prepare and sign written reports.

instructions for what the attorneys need and explanations of what the case is about.[18]

The range and depth of the exchange of information between an attorney and an expert witness will vary with the issues and individuals involved, but no competent trial lawyer even makes his or her selection of an expert witness without having spent hours communicating with the expert. An attorney only calls an expert to testify when the attorney believes the expert will support the attorney's theory of the case,[19] and the attorney's belief is necessarily developed from the attorney's interactions with the expert (or from the interactions of those persons directed by the attorney). Such communications, if they are efficient, nearly always involve opinion work product since the quickest way for an attorney to determine whether a particular expert witness will be able to testify favorably is for the attorney to share his or her theory of the case with the potential witness.

II. THE FEDERAL COURTS: DISCOVERY OF WORK PRODUCT SHARED WITH AN EXPERT WITNESS

How to treat work product information shared between an attorney and his or her expert witness has been the subject of discovery wars in the federal courts for years. The conflict between discovery and protection is present

[18] Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 785 (1994).
[19] *Id.* at 784.

even within the very rule that outlines the process of expert witness discovery, Federal Rule of Civil Procedure 26.

Federal Rule of Civil Procedure 26 contains provisions both promoting discovery of information considered by testifying experts, and protecting work product shared with experts from discovery. Subdivisions 26(a)(2)(A) (requiring disclosure of the identity of anyone who may be used as a testifying expert at trial),[20] 26(a)(2)(B) (requiring each testifying expert to prepare a written report including, *inter alia*, all opinions the expert will express, all bases for the opinions, and the information the expert considered in forming the opinions),[21] and 26(b)(4)(A) (allowing depositions of testifying experts after their expert reports are completed)[22] promote discovery from testifying experts. Subdivisions 26(b)(3) (limiting discovery of work product)[23]

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[20] See note 1 for the text of FED. R. CIV. P. 26(a)(2)(A).
[21] See note 2 for the text of FED. R. CIV. P. 26(a)(2)(B).
[22] See note 3 for the text of FED. R. CIV. P. 26(b)(4)(A).
[23] FED. R. CIV. P. 26(b)(3):

> **Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party's representative (including the other party's . . . consultant . . .) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials . . ., the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney [or representative].

and 26(b)(4)(B) (limiting discovery from nontestifying experts)[24] protect information from discovery.

Like children lying on the grass looking up at the sky describing the different figures they see in the clouds, some federal courts look at the language of Federal Rule of Civil Procedure 26 and see full discovery, while others look at the same language and see work product protection. Though neither the Court of Federal Claims nor the boards of contract appeals are bound to follow the Federal Rules of Civil Procedure, or the opinions of federal courts interpreting the Federal Rules of Civil Procedure, both forums use the Federal Rules of Civil Procedure as a guide for their discovery decision-making where their own rules are silent--as the rules of the boards of contract appeals are on the specifics of discovering attorney work product used by an expert witness.[25]

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[24] FED. R. CIV. P. 26(b)(4)(B):

> A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial . . . only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

[25] *AEC Corp.*, ASBCA No. 42920, 93-2 BCA ¶ 25,793; *Inslaw, Inc.*, DOTCAB Nos. 1609 *et al*, 89-3 BCA ¶ 22,121; and *Chester B. Giffin*, GSBCA No. 7160, 84-2 BCA ¶ 17,449 all state that the Federal Rules of Civil Procedure serve as a guide when the board's rules are silent.

The Court of Federal Claims has its own rules of procedure, patterned after the Federal Rules of Civil Procedure.[26] The Court of Federal Claims even has a rule comparable to Federal Rule of Civil Procedure 26, though the Court of Federal Claims rule did not adopt the changes to Federal Rule of Civil Procedure 26 made by the 1993 Amendments to the Federal Rules of Civil Procedure.[27] The Court of Federal Claims has stated it "may use interpretations of the Federal Rules in applying analogous Claims Court rules."[28]

Though federal court decisions applying Federal Rule of Civil Procedure 26 are not binding on the Court of Federal Claims or the boards of contract appeals, the decisions address the same questions the Court of Federal Claims and the boards have to answer. The reasoning contained within the federal court decisions mirrors the reasoning applicable in the government contract forums, and illuminates the rationale contained within the various

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[26] COURT APPROVED GUIDELINES FOR PROCUREMENT PROTEST CASES, United States Court of Federal Claims, December 11, 1996, p. 2. For purposes of keeping track of nomenclature, rules of the Court of Federal Claims are abbreviated "RCFC" today, having been abbreviated "RUSCC" when the court called itself the United States Claims Court. The RCFC numbers track the Federal Rules. When an RCFC substantively modifies a Federal Rule, the RCFC will have an added decimal place beyond the Federal Rule number it modifies. For example, there is an RCFC 52, Findings by the Court (corresponding to FED. R. CIV. P. 52), and an RCFC 52.1, Unpublished Opinions (which has no counterpart in the Federal Rules). However, within RCFC rules that have a Federal Rule counterpart, the subdivisions of the rules may *not* match: for example, RCFC 26(b)(2) is the equivalent of FED. R. CIV. P. 26(b)(3).

[27] In analyzing how the Court of Federal Claims addresses the disclosure/protection conflict, the major implication of the court's failure to adopt the 1993 Amendments is post-1993 Amendments federal cases interpreting FED. R. CIV. P. 26 may hold even less sway over the Court of Federal Claims than they would otherwise.

[28] *Deuterium*, 19 Cl.Ct. at 700 n.3, citing *Allgonac Mfg. Co. v. United States*, 458 F.2d 1373, 1376 (Ct.Cl. 1972) (*Deuterium* was comparing then-RUSCC 26(b)(2) to FED. R. CIV. P. 26(b)(3), finding them "virtually identical.").

expert witness discovery arguments. Therefore, understanding the federal court decisions addressing expert witness discovery under Federal Rule of Civil Procedure 26 is crucial to winning expert witness discovery arguments in front of the Court of Federal Claims and the boards of contract appeals. The changes made to the expert witness subdivisions of Federal Rule of Civil Procedure 26 by the 1993 Amendments to the Federal Rules of Civil Procedure create a logical dividing line for analyzing the federal court opinions.

A. Before the 1993 Amendments

The most recent defining moment in the conflict between full discovery and protection of work product was the 1993 Amendments to the Federal Rules of Civil Procedure. The 1993 Amendments changed significant sections of Federal Rule of Civil Procedure 26, including the subdivisions addressing expert witness discovery.[29] But the federal court rulings preceding "new" Rule 26 are the foundation upon which the "new" Rule 26 decisions are based, and provide the means of supporting or attacking the "new" Rule 26 decisions; the arguments made in the federal court decisions applying the "old" rules have shaped how the federal courts resolve the issue of work product discoverability under the "new" rules. Knowing the history of expert

[29] PROPOSED RULES, 137 F.R.D. 53 (1991), contains both the text of the pre-1993 Amendments rules, and the specific proposed changes to the text. Not all of the proposed changes to the text were adopted: the language of the "new" rules is not exactly the same as that contained within PROPOSED RULES, 137 F.R.D. 53. (Note the Federal Rules of Civil Procedure title every amendment other than 1993 in the singular; however, for 1993, it is "1993 Amendments.").

witness discovery is especially important since some federal courts still rely on "old" rules precedent to guide their decisions.

"Old" rules precedent has special applicability to the Court of Federal Claims because Court of Federal Claims' Rule 26 is currently patterned after "old" Rule 26 of the Federal Rules of Civil Procedure.[30] Consequently, the reasoning of the "old" rules cases tracks the language of the current Court of Federal Claims' Rule 26.

1. "Old" Federal Rule of Civil Procedure 26

Even before Federal Rule of Civil Procedure 26 was changed by the 1993 Amendments, the rule already contained internal tension between discovery of expert witness information and protection of work product. "Old" Rule 26(b)(4) addressed the "[d]iscovery of facts known and opinions held by experts,"[31] and allowed a party to use interrogatories to discover the identity of an opposing party's expert witnesses, the subject matter they would testify to, the facts and opinions they would testify about, and a summary of the bases for their opinions.[32] However, "old" Rule 26(b)(3) protected work product.

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[30] Churchill, Hamelburg, and Rose, *Practitioner's Viewpoint: The Court of Federal Claims Should Adopt the New Mandatory Disclosure Requirements of Rule 26*, 24 PUB. CONT. L. J. 131, 137 n.34 (1994); see 137 F.R.D. 53, 87-99 for text of "old" Rule 26.

[31] PROPOSED RULES, 137 F.R.D. at 93. Subdivision (b)(4)(A) addressed experts expected to testify at trial, and subdivision (b)(4)(B) addressed experts not expected to testify at trial.

[32] *Id.* (See subdivision (b)(4)(A)(i).).

"Old" Rule 26(b)(3) was not changed by the 1993 Amendments--the language of "old" Rule 26(b)(3) and "new" Rule 26(b)(3) is identical[33]--begging the question: "What happens to work product information an expert uses or creates?" In answering the question of how to interpret the limitations of Rule 26(b)(3) in conjunction with the discovery provisions of "old" Rule 26(b)(4), federal courts could not reach agreement, and developed approaches that extended from "protect all work product" on one end, to "discoverable if given to a testifying expert" on the other.[34]

2. How Federal Courts Interpreted the "Old" Rule

The differing approaches taken by the federal courts can be depicted on a continuum for comparison.

Continuum of Protection

protect all work product	protect opinion work product	protect opinion work product unless substantial need/undue hardship	protect opinion work product unless relied upon by expert witness	discoverable if given to expert witness

On the "protection" end, some federal courts held opinion work product given to an expert witness, even if it may have influenced the expert's opinions, was never discoverable because of the second sentence of Federal Rule of

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[33] *Id.* at 92-93 (The absence of subdivision (b)(3) at 92-93 shows (b)(3) was not changed.).
[34] *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 634-35 (N.D.Ind. 1996); Mickus, *supra* note 18, at 776-77 (Mickus characterizes the courts' approaches as either "discovery-oriented" or "protection-oriented," and identifies five approaches.); Plunkett, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?*, 69 TEMP. L. REV. 451, 455-466 (1996) (Plunkett identifies six approaches.) .

Civil Procedure 26(b)(3), which appeared to give absolute protection to opinion work product by stating a "court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." However, ordinary work product was discoverable under the first sentence of Rule 26(b)(3) upon a showing of substantial need and undue hardship.[35] In another approach favoring protection, other federal courts read Rule 26(b)(3) as allowing the discovery of "second-sentence" opinion work product if the party seeking discovery could cross the "first-sentence" hurdle of showing substantial need and undue hardship.[36]

More in the middle of the road were holdings allowing discovery of Rule 26(b)(3) "first-sentence" ordinary work product without a showing of substantial need and undue hardship, but protecting Rule 26(b)(3) "second-sentence" opinion work product if the information was "clearly the attorney's

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[35] *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283 (M.D.N.C. 1985); *Guadalupi v. Saint Therese Hosp.*, 1985 WL 4094 (N.D.Ill. 1985); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[36] *Bethany Medical Center v. Harder*, 1987 WL 47845 (D.Kan. 1987) (denying discovery); *Hamel v. Gen. Motors Corp.*, 128 F.R.D. 281 (D.Kan. 1989) (denying discovery). (Mickus argues this approach is subject to inconsistent application as "substantial need/undue hardship" might be interpreted differently by different courts. Mickus, *supra* note 18, at 796. Certainly with any test involving discretion, different courts could produce different results, but this approach is protectionist because courts have consistently justified their decisions to protect work product given to an expert by citing the "substantial need/undue hardship" language of Rule 26(b)(3) as a high hurdle to cross. The *In re Comair Air Disaster Litigation* case cited by Mickus at 796, n.106, to support his contention that courts are unpredictable in their application of the "substantial need/undue hardship" test, allowed discovery from a nonexpert witness based upon FED. R. EVID. 612.).

mental processes and clearly could not have influenced the expert."[37] The outcome of this approach rested on what "influenced" meant under the circumstances. Also in the center, other federal courts allowed discovery of work product if the expert relied upon it in forming his opinions.[38] The outcome of this approach depended upon what "relied upon" meant.

One federal court pointed to Federal Rule of Evidence 612 as a valid vehicle for discovering work product shown to an expert witness, comparing the use of such documents to the use of documents to refresh a witness's recollection.[39] However, the court did not, in the particular circumstances before it, order disclosure.[40]

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[37] *SiLite, Inc. v. Creative Bath Prods., Inc.*, 1993 WL 384562, *1, (N.D.Ill.1993), citing *Mojica v. Doboy Packaging Mach.*, 1987 WL 7813 (N.D.Ill. 1987).
[38] *In re Shell Oil Refinery v. Shell Oil Co.*, 1992 WL 58795 (E.D.La. 1992); *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611 (D.N.J. 1989); *Fauteck v. Montgomery Ward & Co. Inc.*, 91 F.R.D. 393 (N.D.Ill. 1980); *Trimec, Inc. v. Zale Corp.*, 1992 WL 245602 (N.D.Ill. 1992).
[39] *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 617 (S.D.N.Y. 1977).
[40] *Id.* FED. R. EVID. 612 says:

> **Writing Used to Refresh Memory.** [I]f a witness uses a writing to refresh memory for the purpose of testifying, either——
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, [and] to cross-examine the witness thereon. . . .

It is hard to see how a court could require a party presenting a pure expert witness (one without firsthand knowledge of the facts forming the bases of the witness's opinions) to produce documents the expert witness reviewed under FED. R. EVID. 612, since a pure expert witness has no memory of the events to be refreshed in the first place. FED. R. EVID. 612 is a poor vehicle under which to order pure expert witness discovery. (See *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 386 n.1 (N.D.Cal. 1991).) In the case of lay witnesses, courts are split over whether FED. R. EVID. 612 trumps the work product doctrine. *Spork v. Peil*, 759 F.2d 312, 315 (3d Cir. 1985), *cert. denied*, 474 U.S. 903 (1985) (a 2-1 decision), held an attorney's document selection process itself was attorney work product, as the documents selected by an attorney to prepare a witness to testify revealed the attorney's

Finally, on the discovery end, some federal courts required disclosure of all work product shared with an expert when that work product related to the subject matter of the expert's testimony.[41]

3. The Definitive Historical Federal Court Cases

The two "old" Rule 26(b) federal cases which best describe the arguments at each end of the historical federal court continuum are *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984) (protecting work product shared with an expert witness) and *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991) (allowing discovery of information given to a testifying expert).[42]

a. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984)

At issue in *Bogosian* were various documents reviewed by plaintiff's testifying expert that defendant requested in discovery before the testifying expert was

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mental impressions. *Spork* denied discovery under FED. R. EVID. 612 of the identification of the documents used to prepare a witness. A Court of Federal Claims case, *Eagle-Picher Indus., Inc. v. United States*, 11 Cl.Ct. 452 (1987), cites *Spork* favorably. *James Julian Inc. v. Raytheon Corp.*, 93 F.R.D. 138, 145-46 (D.Del. 1982), ordered, under FED. R. EVID. 612, the production of binders of documents used to prepare deponents to testify, stating that the use of the documents to prepare witnesses amounted to a waiver of work product protection. *Bohannon v. Honda Motor Co. Ltd.*, 127 F.R.D. 536, 539 (D.Kan. 1989) is factually distinguishable from *Spork*, but does comment negatively on *Spork's* holding. In *In re Minebea Co., Ltd.*, 143 F.R.D. 494, 500 (S.D.N.Y. 1992), the court gets around the issue of whether the document selection process is work product by requiring the identity of all documents reviewed by a witness, but not requiring revelation of whether the documents were furnished to the witness by counsel.

[41] *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D.Cal. 1991); *Boring v. Keller*, 97 F.R.D. 404 (D.Colo. 1983).

[42] See Waits, *supra* note 10, at 399-408, for a thorough examination of the judges involved in the two decisions, and their reasoning.

to be deposed.[43] The documents requested by defendant included, among others, "[a]ll documents sent to the expert by the plaintiffs or their counsel," and "[a]ll documents that have been or will be shown to the expert during or in preparation of the expert's testimony at deposition or trial."[44] Plaintiff declined to produce 115 documents it identified as work product, defendant filed a motion to compel, and the district court ordered plaintiff to produce the work product documents, reasoning that the deposition might be used as a trial deposition and defendant therefore needed the documents to perform meaningful cross-examination.[45] The district court also found subdivision (b)(4)(A) of "old" Rule 26 trumped the work product protection of subdivision (b)(3) for documents shown to a testifying expert.[46]

However, the Third Circuit, relying upon the protection of opinion work product enunciated in *Hickman v. Taylor*, which the Third Circuit said was essentially codified in Federal Rule of Civil Procedure 26(b)(3) and reemphasized in *Upjohn Co. v. United States*, overturned the district court's ruling.[47] In a 2-1 holding, the Third Circuit found opinion work product must be protected in an adversarial system in order to allow uninhibited trial preparation.[48] The court said the second sentence of subdivision (b)(3) gave

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[43] *Bogosian*, 738 F.2d at 589.
[44] *Id.*
[45] *Id.* at 590.
[46] *Id.* at 590-91.
[47] *Id.* at 592-93.
[48] *Id.* at 593.

opinion work product nearly absolute protection.[49] The Third Circuit read the language beginning the first sentence of subdivision (b)(3) ("Subject to the provisions of subdivision (b)(4) of this rule . . .") as applying only to the discovery of ordinary work product from expert witnesses under the first sentence of subdivision (b)(3), and found opinion work product was protected by the second sentence of subdivision (b)(3), which was not affected by the lead-in language of the first sentence.[50]

b. *Intermedics, Inc. v. Ventritex, Inc.,* 139 F.R.D. 384 (N.D. Cal. 1991)

At the other end of the continuum, in *Intermedics*, defendant asked plaintiff's expert witness at deposition about conversations related to the subject matter of the expert's testimony that the expert had had with plaintiff's counsel, and about documents plaintiff's counsel had prepared and shown to the expert witness.[51] Plaintiff's counsel instructed the expert not to answer, and defendant filed a motion to compel.[52] Before the court addressed the motion to compel, the court ruled on the merits of one part of the case, making the motion to compel moot; however, the parties asked the court to rule on the discovery issue anyway, since the issue was bound to resurface.[53] The court

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[49] *Id.* at 594.
[50] *Id.* See note 23 for the text of FED. R. CIV. P. 26(b)(3).
[51] *Intermedics*, 139 F.R.D. at 385.
[52] *Id.*
[53] *Id.*

agreed to do so, providing the parties with a prospective rule governing discovery of information shared with an expert witness.[54]

Intermedics held opinion work product communicated to an expert witness was discoverable.[55] The court applied what it called an "open balancing test," which the court said neither favored discovery nor protection.[56] But in applying the test, the court also said disclosure would result unless the party seeking protection could show "unfairness that goes well beyond the interests generally protected by the work product doctrine."[57] Commentators noted the *Intermedics* balancing test was skewed toward disclosure, and should result in a court ordering disclosure if a court found opinion work product was reviewed by the testifying expert.[58]

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[54] *Id.*
[55] *Id.* at 387.
[56] *Id.* at 391. The court outlined the steps in its "open balancing test" at 391-92:

> (1) identify the interests that the work product doctrine is intended to promote,
> (2) make a judgment about how much those interests would be either (a) harmed by a ruling that the kinds of communications in issue . . . are discoverable or (b) advanced by a ruling that [the] communications are not discoverable,
> (3) identify the relevant interests that are promoted by Federal Rule of Civil Procedure 26(b)(4), and by Federal Rules of Evidence 702, 703, and 705, and then
> (4) make a judgment about how much those interests would be either (a) harmed by a ruling that the kinds of communications in issue . . . are not discoverable or (b) advanced by a ruling that [the] communications are discoverable.

[57] *Id.* at 387.
[58] Waits, *supra* note 10, at 402 ("The *Intermedics* opinion came down on the side of discovery almost as absolutely as the *Bogosian* majority came down against it."); Mickus, *supra* note 18, at 804 and 804 n.141. In spite of the view that the *Intermedics* approach favors disclosure, at least one court (*Rail Intermodal*, see note 74) has applied the *Intermedics* balancing test and *protected* work product.

Intermedics also looked at the language of Federal Rule of Civil Procedure 26(b)(3), and concluded the beginning of the second sentence of the rule ("In ordering discovery of such materials . . .") referred to the materials included within the first sentence of the rule, thereby applying the "Subject to the provisions of subdivision (b)(4) of this rule" language to both sentences of Rule 26(b)(3).[59]

Bogosian and *Intermedics* capture the division within the federal courts' historical treatment of expert witness discovery. Even after the advent of the "new" rules, both cases continue to be cited in support of the positions they represent, and the reasoning of the cases has been adopted in interpretations of the "new" rules.

B. After the 1993 Amendments

Since the conflict between the discovery of information given to testifying experts and the protection of work product was evident before the 1993 Amendments to the Federal Rules of Civil Procedure, the 1993 Amendments had an opportunity to change Rule 26 so as to clearly resolve any disputes over what is discoverable. However, the 1993 Amendments did not take full advantage of their opportunity, still leaving room for Rule 26 to be interpreted at least two divergent ways.

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[59] *Intermedics*, 139 F.R.D. at 388-89. See note 23 for the text of Rule 26(b)(3).

1. "New" Federal Rule of Civil Procedure 26

The 1993 Amendments made several key changes to Federal Rule of Civil Procedure 26 regarding the discovery of information from testifying experts. The "new" rules moved the substantive discovery requirements for testifying experts from "old" Rule 26(b)(4) to "new" Rule 26(a)(2). This change made expert discovery part of the automatic disclosure provisions of the "new" rules. Like the required initial disclosures of "new" Rule 26(a)(1),[60] "new" Rule 26(a)(2) also requires a significant portion of testifying expert information be turned over to the opposing party even without a discovery request.

Some have taken the position that for the purposes of applying work product protection, the required disclosures of "new" Rule 26(a) are not truly discovery, and therefore work product protection should not apply.[61] This position depends upon divorcing subdivision (a) from subdivision (b) on the basis of subdivision (a)'s use of the heading "Required Disclosures" instead of "Required Discovery." Subdivision (a) is better viewed as a form of discovery that merely no longer requires a discovery request, than some form of "nondiscovery." Subdivision (a)(1)(C) states a party does not have to provide any documents or materials that are "privileged or protected from disclosure," a description which certainly includes work product.

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[60] Many jurisdictions have opted out of the required disclosures of the "new" rules. *See* Loevinger, *Science as Evidence*, 35 JURIMETRICS J. 153, 161-62 n.53 (1995).
[61] *Karn*, 168 F.R.D. at 638, (citing Plunkett, *supra* note 34, at 476-77).

Anyway, splitting hairs over whether subdivision (a)(2) disclosures are discovery or not has no practical effect as a party may, even under the new required disclosures process, merely *identify* documents under subdivision (a)(2) without producing the documents until an opponent serves a request for production.[62] Once a request for production is served, the work product and privilege protections of subdivision (b)(3) are applicable, putting the conflict between work product protection and expert witness discovery back at center stage. In the government contract litigation forums, the question of whether subdivision (a)(2) disclosures are discovery or not is irrelevant as neither the rules of the Court of Federal Claims nor the rules of the boards of contract appeals have adopted the automatic disclosure requirements of "new" Rule 26(a).

The more significant change created by removing the substantive discovery of expert witnesses from subdivision (b)(4) was that the introductory language of subdivision (b)(3) ("Subject to the provisions of subdivision (b)(4) of this rule . . . ,") no longer had any direct connection to the substantive discovery rules concerning testifying experts: the "new" rules moved the substantive testifying expert discovery rules to subdivision (b)(2). The 1993 Amendments left subdivision (b)(3) as it was before the 1993 Amendments, word-for-word, so when the 1993 Amendments changed subdivision (b)(4),

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[62] Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure--A Critical Analysis*, 12 TOURO L. REV. 7, 96 (1995).

subdivision (b)(3) was apparently "subject to" something different than it used to be (though even before the 1993 Amendments changed subdivision (b)(4), the courts could not agree on what the interrelationship between subdivision (b)(3) and subdivision (b)(4) was).

In "new" rules jurisdictions, those favoring disclosure argue the removal of testifying expert discovery from "old" Rule 26(b)(4) was intended to release all limitations on discovery from testifying experts. Those favoring protection argue the movement of expert witness discovery to "new" Rule 26(a)(2) was for the purpose of altering the *method* of initial discovery, not its scope, merely requiring initial expert disclosures to occur without a discovery request.

"New" Rule 26(a)(2) also expands the scope of information discoverable from testifying experts. "New" Rule 26(a)(2)(B) requires a written report from each testifying expert that must include the opinions the expert will express, all bases for the opinions, and the information the expert considered in forming the opinions.[63] "Old" Rule 26(b)(4)(A) only allowed a party to request the substance of the facts and opinions a testifying expert might testify to, and "a summary of the grounds for each opinion."[64]

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[63] See note 2 for the text of Rule 26(a)(2)(B).
[64] PROPOSED RULES, 137 F.R.D. at 93.

The "data or other information *considered by* the witness" language of "new" Rule 26(a)(2)(B) (emphasis added) creates an argument that everything the witness sees, whether the witness relies upon it or not, is subject to discovery.[65] This argument is given more weight by the fact that the proposed changes to "old" Rule 26 suggested the language "relied upon" be used in subdivision 26(a)(2)(B), but the 1993 Amendments opted to replace "relied upon" with the more expansive "considered by."[66]

"Old" Rule 26(b)(4) contained limitations on the discovery of expert witness information "acquired or developed in anticipation of litigation or for trial" by only allowing discovery of "the substance of facts and opinions" and "a summary of the grounds for each opinion,"[67] thereby protecting the specifics of the information. But the expansion of the information discoverable under "new" Rule 26(a)(2) operates to produce more specific information, without carrying over the "acquired or developed in anticipation of litigation or for trial" language of "old" Rule 26(b)(4), nor referencing the protection of opinion work product at all. In fact, the Advisory Committee Notes accompanying "new" Rule 26(a)(2) state the expanded disclosure requirements contained within subdivision 26(a)(2) are such that "litigants

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[65] In fact, as discussed below in section II.B.2.b.(2), even the seminal case protecting opinion work product given to experts under the "new" rules recognizes that "considered by" is broader than "relied upon," and includes anything the expert examined. *Haworth v. Herman Miller, Inc.*, 162 F.R.D. 289, 296 (W.D.Mich. 1995).

[66] PROPOSED RULES, 137 F.R.D. at 89.

[67] *Id.* at 93.

should no longer be able to argue that materials furnished to their experts to be used in forming their opinions . . . are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."[68]

In spite of the Advisory Committee Notes, litigants *are* still arguing that materials furnished to their experts are protected by the work product doctrine. And some have even argued so successfully.

2. How Federal Courts Have Interpreted the "New" Rule

The "new" rules have not eliminated the division between courts favoring protection and courts favoring disclosure.[69] The interpretations of those jurisdictions using some form of the "new" rules fall into three categories: some federal courts have ignored the expert discovery provisions of the "new" rules and relied upon the work product protection of *Hickman* and *Upjohn*, as substantially codified in Rule 26(b)(3);[70] some federal courts have read the "new" rules as protecting opinion work product considered by the

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[68] FED. R. CIV. P. 26(a)(2) ADVISORY COMMITTEE NOTES, 1993 Amendments.

[69] Plunkett, *supra* note 34, at 452 and 471. Plunkett categorizes the post-1993 Amendments decisions as those: interpreting the "new" rules to require disclosure of only the fact work product considered by testifying experts, ignoring the "new" rules, and interpreting the "new" rules as broadening discovery to include opinion work product examined by a testifying expert.

[70] *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994); *Blakey v. Continental Airlines, Inc.*, 1995 WL 464477 (D.N.J. 1995); *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85 (S.D.W.Va. 1995); *Rail Intermodal Specialists, Inc. v. Gen. Elec. Capital Corp.*, 154 F.R.D. 218 (N.D.Iowa 1994); *Mader v. Motorola Inc.*, 1994 WL 535125 (N.D.Ill. 1994).

testifying expert;[71] and some federal courts have interpreted the "new" rules as broadening discovery to include opinion work product.[72]

a. What "New" Rule?

Some courts have ignored any discussion of the changes to Federal Rule of Civil Procedure 26 applicable to expert witness discovery, and have relied upon "old" rules precedent. In *Cordy v. Sherwin-Williams Co.,* 156 F.R.D. 575, 577 (D.N.J. 1994), the court favorably cited the holding of *Bogosian* as the proper approach in restricting disclosure of an attorney's mental impressions the attorney shared with his or her expert witness. In *Blakey v. Continental Airlines, Inc.*, 1995 WL 464477, *7 (D.N.J. 1995), decided a little more than a year later, the same district court again protected work product given to an expert without mentioning the 1993 Amendments. Instead, the court relied on the protection of work product provided by *Hickman* (as cited in *United States v. Nobles*, 442 U.S. 225, 238 n.11 (1975)).

Likewise, in *Maynard v. Whirlpool Corp.,* 160 F.R.D. 85, 88 (S.D.W.Va. 1995), the court fell back on *Hickman*, and *Bogosian* and its progeny, in finding opinion work product was almost absolutely privileged. *Maynard*

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[71] *All West Pet Supply Co. v. Hill's Pet Prods.*, 152 F.R.D. 634 (D.Kan. 1993); *Haworth v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D.Mich. 1995); *Magee v. The Paul Revere Life Ins. Co.*, 1997 WL 199071 (E.D.N.Y. 1997).

[72] *B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of New York, Inc.*, 171 F.R.D. 57 (S.D.N.Y. 1997); *Karn v. Ingersoll Rand*, 168 F.R.D. 633 (N.D.Ind. 1996); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61 (D.N.M. 1996); *Caruso v. Coleman Co.*, 1994 WL 719759 (E.D.Pa. 1994); *Baxter Diagnostics, Inc. v. AVL Scientific Corp.*, 1993 WL 360674 (C.D.Cal. 1993).

involved a deposition question seeking information about oral communications with an expert witness; the court found the oral communications were covered by *Hickman*, as opposed to Federal Rule of Civil Procedure 26(b)(3) (since Rule 26(b)(3) only covered documents and tangible things, and the communications at issue were intangible).[73] The court's mention of Rule 26(b)(3)'s lack of applicability to oral communications is the extent of the court's "examination" of the Federal Rules of Civil Procedure relating to discovery of work product shared with expert witnesses.

In *Rail Intermodal Specialists, Inc. v. Gen. Elec. Capital Corp.*, 154 F.R.D. 218 (N.D. Iowa 1994), the court not only ignored the "new" rules, but also added the twist of adopting the approach of *Intermedics* to *deny* access to opinion work product testifying experts had not only reviewed, but stated they had relied upon in forming their opinions.[74] In *Mader v. Motorola Inc.*, 1994 WL 535125 (N.D. Ill. 1994), the court managed to deny disclosure of work product without citing any supporting authority.[75] Though the *Mader* court

[73] *Maynard*, 160 F.R.D. at 87.

[74] *Rail Intermodal*, 154 F.R.D. at 219 and 221. Perhaps *Rail Intermodal* really stands for the proposition that without a bright-line "all-or-nothing" rule, any approach containing a balancing test (even one as skewed toward discovery as the *Intermedics* one) can be interpreted in any manner possible.

[75] *Mader*, 1994 WL at *11 (denying document request related to expert witnesses because it encompassed information protected by "work product immunity," without explanation of where such immunity came from).

referenced Rule 26(a)(2), the court did not discuss why work product information was not encompassed by Rule 26(a)(2).[76]

b. The "New" Rule Protects Opinion Work Product

Three federal courts have specifically addressed the "new" rules and interpreted them as continuing to protect opinion work product. In *All West Pet Supply Co. v. Hill's Pet Prods.*, 152 F.R.D. 634, 638-39 (D.Kan. 1993), the court relied upon "old" rules cases and a short statement of its interpretation of the "new" rules to reach its decision. On the other hand, the court in *Haworth v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995), gave a detailed explanation for why the "new" rules do not change the protection afforded opinion work product by *Hickman*. *Magee v. The Paul Revere Life Ins. Co.*, 1997 WL 199071 (E.D.N.Y. 1997), followed *Haworth*.

(1) *All West Pet Supply Co. v. Hill's Pet Products*, 152 F.R.D. 634 (D.Kan. 1993)

All West Pet Supply was decided 14 days after the "new" rules went into effect.[77] In *All West*, two documents containing work product were relied upon by a testifying expert in the formulation of the expert's opinion.[78] The

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[76] *Id.* This may be because the court was worn out and fed-up with the "discovery wars" occurring between the parties (referenced in the very first paragraph of the decision), and refrained from issuing any detailed reasoning to keep additional arguments to a minimum.
[77] *All West*, 152 F.R.D. at 634-35 (the "new" rules went into effect on 1 December 1993, and *All West* was decided on 16 December 1993).
[78] *Id.* at 635 n.2.

court protected the information within the documents without relying upon a finding the documents contained opinion work product.[79] The court held the substantial need and undue hardship requirements of the first sentence of Federal Rule of Civil Procedure 26(b)(3) were not met, and therefore the work product contained within the documents was protected.[80]

The court went on to say it was not necessary to decide whether the documents contained opinion work product, since the substantial need and undue hardship requirements allowing the discovery of ordinary work product were not even met--the requirements for allowing the discovery of opinion work product would be even higher.[81] *All West's* explanation for its reading of the "new" rules is contained in its entirety within a short footnote stating the court's position that the "new" rules only require ordinary work product to be disclosed, and opinion work product is essentially absolutely protected.[82] If the court had simply relied upon *Bogosian* and its progeny as precedent, and stated the "new" rules changed nothing, the court's holding would have said the same thing.

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[79] *Id.* at 637 n.5.
[80] *Id.* at 637-38 (citing *Bethany Medical Center v. Harder*, 1987 WL 47845 (D.Kan. 1987) and *Hamel v. Gen. Motors Corp.*, 128 F.R.D. 281 (D.Kan. 1989), two "old" rules "substantial need/undue hardship" cases out of *All West's* district).
[81] *Id.* at 637 n.5.
[82] *Id.* at 639 n.9.

(2) *Haworth v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995)

The *Haworth* court also held the "new" rules did not change the protection of opinion work product given to a testifying expert, but the court supported its holding by walking through its interpretation of the 1993 Amendments to Federal Rule of Civil Procedure 26. In *Haworth*, during defendant's deposition of plaintiff's expert witness, defendant asked the expert about conversations the expert had with plaintiff's counsel regarding information plaintiff's counsel gave the expert for the preparation of the expert's report.[83] Plaintiff objected that the questions requested protected work product, and directed the witness not to answer the questions. The parties then asked for a ruling from the magistrate.[84]

Haworth stated that a change to "[t]he high privilege accorded attorney opinion work product . . . would require clear and unambiguous language in a statute . . . [citing *Hickman*] [and] no such language appears [in the "new" rules]."[85] The *Haworth* court first looked at the "old" rules, and the *Bogosian* and *Intermedics* interpretations of the "old" rules, and concluded that under the "old" rules, opinion work product shared with an expert was not discoverable.[86] In concluding "old" Rule 26 only allowed for the discovery of ordinary work product, the court primarily relied upon the Advisory Committee

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[83] *Haworth*, 162 F.R.D. at 291.
[84] *Id.*
[85] *Id.* at 295.
[86] *Id.* at 292-93.

Notes accompanying the creation of "old" Rule 26, and the opening language of "old" Rule 26(b)(4).[87]

The court emphasized "old" Rule 26(b)(4) removed the discovery of *ordinary* work product given to expert witnesses from the protective test of Rule 26(b)(3), and the Advisory Committee Notes accompanying "old" Rule 26(b)(4) explained "old" Rule 26(b)(4) was meant to remove work product as a valid objection to the discovery of ordinary work product, but Rule 26(b)(3) remained a valid objection to the discovery of *opinion* work product.[88] According to the *Haworth* court, all the creation of "old" Rule 26(b)(4) did was lower the standard for the discovery of ordinary work product from the substantial need and undue hardship test contained within the first sentence of Rule 26(b)(3) to a test employing the "unfairness" doctrine.[89] Since "old" Rule 26(b)(4) did not change the standard for the discovery of opinion work product, Rule 26(b)(3)'s protection still controlled opinion work product under the "old" rules.[90]

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[87] *Id.* at 293. The opening language of "old" Rule 26(b)(4) said the rule applied to the "[d]iscovery of facts known or opinions held by experts." PROPOSED RULES, 137 F.R.D. at 93.
[88] *Haworth*, 162 F.R.D. at 293-94.
[89] *Id.* (The "unfairness" doctrine says it would be unfair to allow one party to take advantage of the effort and expenditures of the opposing party by letting the opposing party do all the trial preparation work, then gaining the advantage of that work through discovery.) This is in contrast to the language in the body of *All West*, though in agreement with note 9 in *All West*. *All West*, 152 F.R.D. at 639. In fact, *Haworth* cites note 9 of *All West* in support for *Haworth's* interpretation that the "new" rules removed ordinary work product given to an expert from the protection of 26(b)(3). *Haworth*, 162 F.R.D. at 295.
[90] *Haworth*, 162 F.R.D. at 294.

The court then examined whether the 1993 Amendments changed the "old" rules standard for the discovery of opinion work product. In considering the changes made by the "new" rules, the court found the key change affecting the discovery of expert witness information was to require certain disclosures be made automatically, without waiting for a discovery request.[91] *Haworth* found the "new" rules merely provide a new procedure for a party to get information regarding expert witness testimony--the new procedure did not expand the type of information discoverable to include opinion work product.[92]

Haworth discussed the extremely high standard for discovery of opinion work product, as described in *Hickman*, and cited several "old" rules cases (*Bogosian* and progeny) following the rationale of *Hickman* and holding opinion work product shared with an expert witness is absolutely privileged.[93] However, for factual information, the court said, without any discussion or analysis, "new" Rule 26(a)(2)(B) expanded the scope of discoverable factual information to include the "disclosure of factual information considered *but not* relied upon . . . ."[94] (emphasis in original)

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[91] *Id.*
[92] *Id.* at 294-95.
[93] *Id.* at 295.
[94] *Id.* at 296. The court spends one short paragraph stating its opinion that "new" Rule 26(a)(2) requires the disclosure of factual information considered but not relied upon, with no discussion of why the court finds the language of the "new" Rule so clear and persuasive. A disclosure-oriented case, *Karn*, comes to the same conclusion after careful examination of the change. *Karn*, 168 F.R.D. at 635.

The reasoning of *Haworth* has been favorably cited by a member of the United States Judicial Conference Advisory Committee on the Federal Rules of Evidence, Gregory P. Joseph, in his examination of the 1993 Amendments' impact on expert witness discovery.[95] Though Mr. Joseph did not draft the Advisory Committee Note for the 1993 Amendments to the Federal Rules of Civil Procedure, his interpretation of the Advisory Committee Note is interesting given his perspective as an Advisory Committee member for the Federal Rules of Evidence. Mr. Joseph has no trouble reading the 1993 Amendments Advisory Committee Note in accordance with the holding in *Haworth*:

> The Advisory Committee's reference to "materials" -- together with its reference to what "litigants should no longer be able to argue" -- suggests that the drafters' intent was to resolve the prior squabbling over the discoverability of the *factual matter* furnished by counsel to a testifying expert to permit the expert to form an opinion.[96] (emphasis added)

Haworth 's reasoning was followed by *Magee v. Paul Revere Life Ins. Co.*, 1997 WL 199071 (E.D.N.Y. 1997).

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[95] Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 104 (1996).

[96] *Id.* at 103. Joseph continues: "This would appear to be confirmed by (i) the scope limitation in the Rule to 'data' and 'information,' both of which denote the factual underpinnings of an opinion, and (ii) the qualification in the Rule that disclosure applies to those data 'considered by the witness in forming the opinions.' The 'considered' criterion in the Rule replaced the law's prior reliance requirement in an attempt to avoid experts burying relevant but adverse information through the mental gymnastic of deciding they did not rely on it. * * * 'Data' and 'information' connote subjects that are factual in nature, not ephemera like 'mental impressions, conclusions, opinions or legal theories' of the sort protected by Rule 26(b)(3)." *Id.* at 103-04, citing *Haworth*. (Speaking of mental gymnastics, the translation and interpretation of the Old Testament, involving ancient idioms rendered in a language having no vowels, must have been child's play compared to Mr. Joseph's translation of the Advisory Committee Note.) .

c. The "New" Rule Makes Opinion Work Product Discoverable

Some federal courts have taken the position the "new" rules mandate all opinion work product given to a testifying expert is discoverable.

(1) *Karn v. Ingersoll Rand*, 168 F.R.D. 633 (N.D.Ind. 1996)

In *Karn*, the court ruled a letter summarizing deposition testimony sent from a party to its testifying expert was required to be disclosed to the other side, even though the letter was opinion work product, and the expert did not rely upon the deposition summaries in forming his opinions (since the expert read the *entire* transcripts of the summarized depositions, and relied upon those).[97] The court considered the 1993 Amendments, and the commentary to the "new" rules, finding "new" Rule 26 requires all work product reviewed by an expert witness, whether relied upon by the witness or not in forming the witness's opinions, and whether opinion work product or not, be disclosed.[98]

Karn found "new" Rule 26(a)(2)(B)'s use of the words "considered by," instead of the words "relied upon" (in Rule 26(a)(2)(B)'s requirement that a party disclose "the data or other information considered by the [expert] witness in forming the [expert's] opinions . . ."), showed the "new" Rule did not require an expert witness to rely upon information given to the expert in

[97] *Karn*, 168 F.R.D. at 633-36.
[98] *Id.* at 635.

order to make the information discoverable: it was enough that the expert reviewed the information.[99] The court also found the new mandatory disclosure requirements of Rule 26(a)(2), as explained in the 1993 Amendments Advisory Committee Notes, were intended to eliminate any argument information given to an expert witness could be protected from disclosure by claiming the information was work product.[100]

(2) *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61 (D.N.M. 1996)

In *Furniture World,* plaintiff's counsel questioned defendant's expert witness during deposition about documents defendant's counsel had given the expert, and which defendant's counsel said contained opinion work product.[101] As in *Karn*, the court found parties cannot protect information they give to expert witnesses by claiming the information is work product.[102] In *Furniture World*, the court apparently thought the changes to "new" Rule 26 and the accompanying Advisory Committee Notes were so clear the court did not need to explain its interpretation of "new" Rule 26, other than to mention the court's holding was consistent with the result reached in the pre-1993 Amendments case of *Intermedics*, and the reasoning used in

[99] *Id.* (in accord with *Haworth*, 162 F.R.D. at 296).
[100] *Id.* 637-38.
[101] *Furniture World*, 168 F.R.D. at 62.
[102] *Id.*

Intermedics was even more compelling after Rule 26 had been changed by the 1993 Amendments.[103]

(3) *B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of New York, Inc.*, 171 F.R.D. 57 (S.D.N.Y. 1997)

In *B.C.F. Oil*, Con Edison requested in discovery that B.C.F. Oil produce 50 documents shared with B.C.F. Oil's expert witness and the expert's subcontractor; B.C.F. Oil refused, claiming protection under the work product doctrine.[104] The court divided the documents into five categories:

(1) documents unrelated to the expert's report or testimony, (2) material consulted by or generated by the expert in connection with the expert's report or testimony, (3) documents containing information provided by the attorney to the expert, (4) the attorney's opinions given to the expert for the expert's review, and (5) notes generated by the attorney after oral communications with the expert.[105] The court then addressed the discoverability of each category under "new" Rule 26.[106]

The court split the first category of documents, "Documents Unrelated to Expert's Testimony," into two types: invoices from the expert and the expert's subcontractor, and materials dealing with the expert's role as a consultant.[107]

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[103] *Id.*
[104] *B.C.F. Oil*, 171 F.R.D. at 60.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 61.

The court found the invoices were not discoverable since they were not considered by the expert in forming the expert's opinions.[108] The court did opine that in a case where the amount of compensation paid to an expert was in dispute, invoices would be relevant, but the amount of compensation was not being addressed in *B.C.F. Oil.*[109]

As to documents withheld by B.C.F. Oil under the claim they were solely related to the expert's role as a consultant, the court ordered some of the documents produced and allowed some to remain protected.[110] In addition to providing expert testimony, B.C.F. Oil used its expert witness as a consultant for depositions of Con Edison witnesses, and to formulate discovery requests and provide other technical expertise.[111] B.C.F. Oil argued documents related to its expert witness's work as a consultant were work product.[112] The court, however, cited two cases in its own district, *Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F.Supp. 1013 (S.D.N.Y. 1983) and *Detwiler Trust v. Offenbecher*, 124 F.R.D. 545 (S.D.N.Y. 1989), for the rule that when a party uses an expert both for testifying and consulting purposes, the burden is on the party using the expert to clearly delineate between each purpose, otherwise any ambiguity should be resolved in favor

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[108] *Id.*
[109] *Id.* at 61 n.2. The compensation a party intends to pay its expert for both the expert's report and testimony is required by "new" Rule 26(a)(2)(B) to be included in the expert's report automatically, without a specific request for the information.
[110] *Id.* at 61.
[111] *Id.*
[112] *Id.*

of discovery.[113] The court found ten documents reviewed by B.C.F. Oil's expert were clearly related only to the expert's consultant role, and were therefore protected from discovery, but the court required disclosure of all other documents B.C.F. Oil claimed the expert reviewed in his consultant role because B.C.F. Oil did not make it clear to the court that the remaining documents might not also have affected the expert's opinion.[114]

For the second category of documents, "Material Generated By the Expert in Connection With His Report and Expert Testimony," the court pointed out B.C.F. Oil did not even raise a claim of work product protection, but instead argued its expert witness did not consider the documents in forming his expert opinions.[115] The court found the second category of documents was written by the expert as part of the preparation of his expert report and testimony.[116] The court relied upon the Advisory Committee Notes to "old" Rule 26(b)(4), and several cases both within and outside of its circuit, to hold "documents generated by experts are not work product within the meaning of

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[113] *Id.* at 61-62 In *Beverage Mktg.*, an expert report allegedly created for the sole purpose of analyzing an opponent's expert report was nonetheless required to be produced in discovery. The *B.C.F. Oil* court pointed out *Beverage Mktg.* is an "old" rules case, pre-dating the automatic requirement for an expert report, but its principles still apply. In *Detwiler*, an expert witness reviewed documents in order to prepare deposition questions for other witnesses. The *Detwiler* court denied a discovery request for the documents, finding they were unrelated to the expert witness's own testimony, but cited *Beverage Mkt.* in saying that if the expert had reviewed the documents in the expert's role as an expert witness, the expert's use of the documents would have been blurred, making the documents discoverable.

[114] *B.C.F. Oil*, 171 F.R.D. at 62.

[115] *Id.*

[116] *Id.*

Rule 26(b)(3)."[117] The court said the 1993 Amendments broadened what a party must disclose regarding expert witness information, and "new" Rule 26 did not affect the "old" Rule 26 position that documents generated by an expert witness were not work product.[118] The court again emphasized if there was an ambiguity relating to whether a document was considered by an expert in the formulation of the expert's opinions, the ambiguity must be resolved in favor of disclosure, as to do otherwise would leave the party seeking discovery at the mercy of an opponent's definition of what "considered" meant.[119]

In discussing the third category of documents, "Documents Containing Facts Provided By the Attorney to the Expert," the court cited both *Bogosian* and *Haworth* for the rule that factual information (as opposed to attorney opinions

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[117] *Id.*

[118] *Id.* at 62 n.4 The court's statement that "old" Rule 26 did not intend for documents prepared by an expert to be protected as work product is correct as to the information "old" Rule 26(b)(4)(A) required to be disclosed--the subject matter on which the expert would testify, the substance of the facts and opinions to which the expert would testify, and a summary of the grounds for the opinions--but as to other documents generated by the expert, the court's statement is not in accord with the holdings of "old" rules protectionist courts (*Bogosian* and its progeny) that still applied work product protection to documents prepared at an attorney's direction, whether they were prepared by an expert or not.

[119] *Id.* at 62. The court reviewed the requested documents *in camera*, and could not say with certainty after its review that the documents might not relate to the expert's testimony. The court stated: "Defendant should not have to rely on plaintiff's representation that these documents were not considered by the expert in forming his opinion." *Id.* at 3. Certainly, with many types of discovery requests, a party is relying upon the representations of its opponent. A party served with a request for documents determines what documents are responsive to the request and therefore only identifies the documents the party believes are responsive, possibly leaving out documents the requesting party may have meant the request to include. In the area of expert witness discovery, requiring a party to at least *identify* every document reviewed by the expert witness after the expert became involved with the case would keep documents from falling victim to the black hole of party-opponent gate-keeping.

and litigation strategies) shared with an expert witness is not protected by the work product doctrine.[120] The court also said the policies underlying the arguments in *Hickman v. Taylor* "are not substantially eroded by requiring disclosure of facts given to testifying experts," as work product protection is primarily for legal strategy, opinions, and theories.[121] The court then addressed the text of "new" Rule 26(a)(2)(B), and pointed out the "new" Rule's requirement that a party disclose all "data or other information considered by the expert witness" would be meaningless if factual information was not included within "data or other information."[122]

In deciding the fourth category of documents, "Attorney Opinions Reviewed By the Expert," was discoverable, like the *Karn* court, the *B.C.F. Oil* court discussed the "old" rules cases and the impact of the changes made by the 1993 Amendments.[123] The court examined both *Bogosian* and *Intermedics*, and concluded that before the "new" rules were adopted, "there was a great

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[120] *Id.* at 62-63. Under neither the seminal "old" rules protectionist case, *Bogosian*, nor the "new" rules protectionist case, *Haworth*, were protectionist courts arguing the work product doctrine was broad enough to cover purely factual information shared with an expert. In contrast to this position is the holding of some courts regarding documents used to prepare a lay witness to testify: a lawyer's selection of the particular documents the lawyer shows to a witness is protected by the work product doctrine since revealing the document selection would show what the lawyer believes is important in the case. *Spork v. Peil*, 759 F.2d 312 (3rd Cir. 1985), *cert. denied*, 474 U.S. 903 (1985). See note 40 for a discussion of FED. R. EVID. 612, and its application to expert witness discovery.

[121] *B.C.F. Oil*, 171 F.R.D. at 63.

[122] *Id.*

[123] *Id.* at 63-67.

deal of uncertainty as to the discoverability of opinion work product when reviewed by an expert."[124]

After highlighting changes to expert discovery made by the "new" rules, the court said the changes were so significant, the reasoning of the "old" rules cases was "probably obsolete."[125] The court acknowledged *Haworth* and *All West Pet Supply* held the "new" rules still protected opinion work product shared with an expert witness, but the court did not directly address what it considered to be the fallacies in the reasoning of *Haworth* or *All West*.[126] Instead, the court cited *Karn* as supporting full disclosure under the "new" rules, and walked through the Advisory Committee Notes to the 1993 Amendments, as had *Karn*.[127] Additionally, the court applied the reasoning of *Intermedics* regarding the language in the first sentence of Rule 26(b)(3) ("Subject to the provisions of subdivision (b)(4) of this rule. . ."), stating the protection of work product given to an expert witness was inapplicable to discovery under "new" Rule 26(b)(4).[128]

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[124] *Id.* at 64-65. *Bogosian* was decided by the Third Circuit, and *B.C.F. Oil* was also in the Third Circuit. *Magee v. Paul Revere Life Ins. Co.*, 1997 WL 199071 (E.D.N.Y. 1997) was also decided by a Third Circuit court, and follows *Bogosian* and *Haworth*.

[125] *B.C.F. Oil*, 171 F.R.D. at 65. Apparently, the court was unfamiliar with some courts ignoring the "new" rules and applying the reasoning of the "old" rules cases. The court also goes on to apply the reasoning of "old" rules disclosure cases to support its own position favoring disclosure, showing the reasoning of the "old" rules cases still provides persuasive policy arguments for how to interpret the "new" rules.

[126] *Id.*

[127] *Id.* at 66.

[128] *Id.*

The final category of documents, "Oral Communications," consisted of notes and memoranda prepared by B.C.F. Oil's attorneys during their conversations with their expert witness.[129] The court held any of the notes or memoranda shown to the expert witness must be disclosed for the same reasons given for the discoverability of the fourth category of documents, "Attorney Opinions Reviewed By the Expert."[130] As to documents summarizing conversations with the expert that were not shown to the expert, since the documents could not themselves have had any effect on the expert's opinions, as the expert never reviewed them, the court said such documents were protected by Rule 26(b)(3).[131] The court said: "It is only when [the] attorney shows such a document to a testifying expert that the protections afforded under Rule 26(b)(3) give way to the disclosure requirements of Rule 26(b)(4) and the document becomes discoverable."[132]

The court also mentioned if the discoverability of oral communications between the attorney and testifying expert was at issue, the court saw no distinction between oral or written communications when an expert witness considered the communication in forming the witness's opinions.[133] The court cited "new" Rule 26(a)(2), two "old" rules cases (*Intermedics* and *William Penn Life Assurance Co. of America v. Brown Transfer and Storage*

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[129] *Id.* at 67.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*

Co., 141 F.R.D. 142 (W.D.Mo. 1990)), and *Karn* in support of the discoverability of oral communications shared with an expert witness.[134]

3. The New Federal Court Continuum

After the 1993 Amendments to Federal Rule of Civil Procedure 26, federal court decisions resolving expert witness discovery issues can be placed on a new protection/disclosure continuum, with the reasoning of *Haworth* on one end and the reasoning of *B.C.F. Oil* and *Karn* on the other. The *Haworth* end is built upon the arguments of *Hickman* and *Bogosian*, and the *B.C.F. Oil/Karn* end has as its foundation the reasoning of *Intermedics*, coupled with the 1993 Amendments to Rule 26.[135]

New Continuum of Protection

Haworth: protect all opinion work product; disclose all ordinary work product given to an expert witness	*B.C.F. Oil/Karn*: disclose all materials, including opinion work product, given to an expert witness

C. Predicting Future Federal Court Rulings

The "new" rules have forced the protection-oriented end of the continuum to give up its protection of ordinary work product in order to hold on to its protection of opinion work product, eliminating the extreme left pole of the old continuum, "protect all work product." The new continuum covers a narrower

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[134] *Id.*

[135] *Karn* actually holds the reasoning of *Intermedics* is no longer needed as the "new" rules have superseded it, but the arguments made by *Intermedics* support the preference for disclosure *Karn* reads within the "new" rules. *Karn*, 168 F.R.D. at 639.

band of possibilities. *Haworth* had to give up the old extreme position and acknowledge the "new" rules opened up the discovery of *something*, otherwise *Haworth* would have had nothing to apply the changed language of "new" Rule 26 to, leaving the argument that the changed language addressed opinion work product as the only logical conclusion. However, the *Haworth* court presented its position like a good trial lawyer, giving away an issue it could not win in order to build credibility--and focusing attention on the issue it considered truly in the balance.

Not only did *Haworth* move protectionist arguments one step closer to the center of the old continuum, but the reasoning included in *Haworth*, *B.C.F. Oil*, and *Karn* has removed the middle ground that existed under the "old" rules. Though some federal courts have rendered opinions after the "new" rules that apparently ignore the "new" rules, those courts' inertia will be overcome as they are faced with answering the same question again, and are confronted with arguments similar to those in *Haworth* and *Karn.*

Protectionist courts can be expected to migrate to the *Haworth* pole because the logic applied in *Haworth* is the only logic available to explain why the changes made by the "new" rules do not affect the protection of opinion work product. The "new" rules created too many dramatic changes for a court to continue to pretend the changes were not intended to have *any* effect.

Adopting the "cut-your-losses" approach of *Haworth* eliminates the old substantial need/undue hardship test's application to ordinary work product in order to preserve Rule 26(b)(3) protection for opinion work product. Additionally, *Haworth* admitted "new" Rule 26(a)(2)'s use of the word "considered" mandates disclosure of factual information the expert looked at but did not rely upon in forming the expert's opinions.[136] *B.C.F. Oil* and *Karn* arrive at the same conclusion regarding *all* information given to an expert witness.[137] Though *Haworth*, and *B.C.F. Oil* and *Karn* do not agree on whether the "new" rules protect opinion work product from discovery, they do agree the "new" rule's use of the word "considered" broadens the scope of discoverable information beyond "relied upon," effectively eliminating the old argument that a document maintained its work product protection because an expert witness did not base the witness's opinion upon it.

In the face of the changes made by the "new" rules, *Haworth* had to give up both the extreme protectionist position that all work product given to an expert witness is protected, and the approaches in the middle of the old continuum, in order to preserve a strong, logical protectionist position. The "new" rules, and *Haworth*, should defeat any protectionist federal court's attempt to revive the middle ground, or an "all-is-protected" position.

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[136] *Haworth*, 162 F.R.D. at 296.
[137] *B.C.F. Oil*, 171 F.R.D. at 66-67; *Karn*, 168 F.R.D. at 635.

The arguments made for discovery in *B.C.F. Oil* and *Karn* are not new to discovery-oriented courts, except that the post-1993 Amendments courts have the luxury of applying the "new" rules to their arguments. Discovery-oriented federal courts lost no ground under the "new" rules, and will continue to apply the reasoning of *B.C.F. Oil* and *Karn*.

III. THE GOVERNMENT CONTRACT FORUMS: DISCOVERY OF WORK PRODUCT SHARED WITH AN EXPERT WITNESS

The battle lines in the Court of Federal Claims and the boards of contract appeals are less distinct than those in the federal courts, not in the least because of the smaller number of cases addressing the issue. The paucity of board cases addressing the conflict probably reflects the voluntary nature of discovery before the boards, where parties are encouraged to work out their differences without involving a judge, and judicial resolution by telephone conference without a published decision.[138]

Neither the Court of Federal Claims nor the boards of contract appeals have produced a clear rule of law allowing a practitioner to know up front how the forums will decide a conflict between disclosure and protection of attorney work product shared with an expert witness, making an understanding of the approaches of the federal courts all the more important for arguing discovery

[138] It may also reflect an unwillingness to be subjected to reciprocal discovery. (See note 4 for the "golden rule" of discovery.).

motions.[139] But both the Court of Federal Claims and the boards have produced decisions whose reasoning can be applied to arguments concerning the discovery of work product shared with an expert witness.

A. The Court of Federal Claims

Besides the Court of Federal Claims' lack of any decisions directly answering the question of whether all expert witness work product information is discoverable, arguing expert witness discovery issues before the Court of Federal Claims is further complicated by the level of authority accorded its decisions. Court of Federal Claims decisions by a single judge are not binding precedent.[140]

Also helping to confuse predictions of how a judge at the Court of Federal Claims might rule on a government contracts expert discovery issue is the wide variety of specialized actions the court deals with: tax, vaccination

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[139] The Department of Transportation Contract Appeals Board has ruled in favor of full disclosure in an "old" rules case addressing discovery of nontestifying expert information in *Donald C. Hubbs, Inc.*, DOTCAB Nos. 2012 *et al.*, 89-2 BCA ¶ 21,740, as discussed below in section III.B.4.a.

[140] *Sun Eagle Corp. v. United States*, 23 Cl.Ct. 465, 472 (1991) ("Claims Court decisions are not binding precedent."); *Technology For Communications Int'l v. United States*, 22 Cl.Ct. 711, 713 (1991) ("[T]he decision of a Claims Court judge is not binding precedent. . . ." In discussing how the determination to publish a decision is made, the court compared the authority of Claims Court decisions to those of federal district courts: though persuasive, neither are binding precedent.); *Martin v. Secretary of the Dept. of Health and Human Servs.*, 1994 WL 390354, *7, n.10 (Fed.Cl. 1994) (Recognizing that a decision from a single judge of the Court of Federal Claims is not binding authority, though it is certainly persuasive.) The Court of Federal Claims certainly cites itself, but the point to remember is the court is not *required* to follow itself. By contrast, published decisions by a judge on the Armed Services Board of Contract Appeals are reviewed and signed by at least two other board judges, arguably providing some internal consistency within the forum.

injuries, government taking of real property, patent infringement, Native American affairs, military pay, and more. These specialized actions have specialized nuances of proof, and a discovery decision involving a vaccination or tax expert may not readily apply to an issue involving an asphalt or soil expert in a government contract case.

1. Court of Federal Claims Rule 26

The Court of Federal Claims has its own rules, the Rules of the United States Court of Claims (RCFC),[141] patterned after the "old" Federal Rules of Civil Procedure. The RCFC are numbered to correspond to their counterparts in the Federal Rules of Civil Procedure.[142] RCFC 26 addresses the discovery of expert witness information, and is nearly identical to "old" Federal Rule of Civil Procedure 26.[143] RCFC 26 did not adopt the changes to Federal Rule of Civil Procedure 26 implemented by the 1993 Amendments, though some practitioners have argued for adoption of the changes.[144] The Court of Federal Claims has stated it "may use interpretations of the Federal Rules in applying analogous Claims Court rules,"[145] so the reasoning of the "old" rules

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[141] "RUSCC" when the court was named the United States Claims Court.
[142] COURT APPROVED GUIDELINES FOR PROCUREMENT PROTEST CASES, United States Court of Federal Claims, December 11, 1996, p. 2. When an RCFC substantively modifies a Federal Rule of Civil Procedure, the RCFC is given an added decimal place: for example, there are both an RCFC 52, Findings by the Court (corresponding to FED. R. CIV. P. 52), and an RCFC 52.1, Unpublished Opinions (which has no counterpart in the Federal Rules).
[143] Compare RCFC 26 to "old" Rule 26 at 137 F.R.D. 53, 87-99.
[144] Churchill, *supra* note 30, at 131
[145] *Deuterium*, 19 Cl.Ct. at 700 n.3, citing *Allgonac*, 458 F.2d at 1376.

federal cases should offer ammunition for arguing expert witness discovery issues before the court.

2. Reliance on Federal Rule of Civil Procedure 26

Though the substance of RCFC 26 is nearly a carbon-copy of the substance of "old" Federal Rule of Civil Procedure 26, the Court of Federal Claims has cited Federal Rule of Civil Procedure 26 in only about a dozen cases, and only a handful of those have addressed expert witness discovery issues in any form.[146] No Court of Federal Claims case discusses how the 1993 Amendments to the Federal Rules of Civil Procedure affect the discovery of work product shared with an expert witness.

One of the cases citing Federal Rule of Civil Procedure 26 postdates the "new" rules, and does cite "new" Rule 26(b)(5) in comparing the rule to the requirements of a pretrial order issued by the court.[147] However, no RCFC subdivision tracks the language of "new" Rule 26(b)(5). Federal Rule of Civil

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[146] *Cabot v. United States*, 35 Fed.Cl. 442 (1996) (preparation of a privileged document log); *Transamerica Ins. Corp., Inc. v. United States*, 28 Fed.Cl. 418 (1993) (duty to supplement interrogatory responses related to projected expert witnesses); *Abruzzo v. United States*, 21 Cl.Ct. 351 (1990) (expert witness's draft report was not protected by work product doctrine or privilege); *Eagle-Picher Indus., Inc. v. United States*, 11 Cl.Ct. 452 (1987) (privileged document log requirements); *White Mountain Apache Tribe of Arizona v. United States*, 4 Cl.Ct. 575 (1984) (testimony of experts not work product).

[147] *Cabot*, 35 Fed.Cl. at 445 n.1. In *Cabot*, the court refused to allow plaintiffs to assert attorney-client privilege or work product doctrine protection for documents plaintiffs failed to adequately describe in plaintiffs' privilege logs. *Id.* at 446. The court had repeatedly ordered plaintiffs to identify each document plaintiffs claimed was protected from discovery, and to "provide a brief statement and justification for the asserted [protection]." *Id.* at 444-45 Plaintiffs had repeatedly failed to comply with the court's orders. *Id.* at 444 and 446. In reference to the requirements contained within its orders, the court said: "The court's guidelines for claiming privilege is [sic] similar to that of Fed. R. Civ. P. 26(b) (a rule the Court of Federal Claims is considering adopting). . . ." *Id.* at 445 n.1.

Procedure 26(b)(5)[148] was added by the 1993 Amendments for the purpose of forcing parties who wish to withhold materials under a claim of privilege or work product protection to identify the materials they are withholding. [149]

3. Reliance on the Key Federal Court Cases

No Court of Federal Claims decision cites *Intermedics*, *Karn*, *B.C.F. Oil*, *Bogosian,* or *Haworth* in regard to expert witness discovery. Neither does the Court of Appeals for the Federal Circuit, the Court of Federal Claims appellate court, cite any of the key federal court cases in addressing expert witness discovery (in fact, few discovery issues of any kind find their way up to the Federal Circuit).

4. The Court of Federal Claims Cases

a. *White Mountain Apache Tribe of Arizona v. United States*, 4 Cl. Ct. 575 (1984)

White Mountain involved complex issues of water resources, grazing land, and timber mismanagement.[150] Though not a government contract case,

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[148] FED. R. CIV. P. 26(b)(5):

> **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

[149] FED. R. CIV. P. 26(b)(5) ADVISORY COMMITTEE NOTES, 1993 Amendments.
[150] *White Mountain*, 4 Cl.Ct. at 576.

White Mountain did have to address the conflict between work product protection and expert witness discovery. Because the issues confronting the expert witnesses in *White Mountain* were quite complicated, and research was required to develop their testimony, the court ordered the parties to present expert testimony through written reports.[151] Plaintiff objected to the court's order for several reasons, including the argument that the testimony of its experts was work product under *Hickman v. Taylor.*[152]

The work product issue before the court was narrow: is a court-ordered expert report work product? The court only spent a short paragraph answering the question "no," but the rationale the court used supports discovery of work product given to expert witnesses in situations other than the specific situation the court addressed. The court examined the 1970 Amendment to the Federal Rules of Civil Procedure to reach its conclusion, and supported its conclusion in three ways: by looking at the comments to the 1970 Amendment, by using a case before the 1970 Amendment, and by using a case after the 1970 Amendment.

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[151] *Id.*

[152] Plaintiff asserted the court lacked "jurisdiction to require preparation of expert witness reports," the court's rules and the Federal Rules of Evidence did not allow the court to order written expert testimony, plaintiff's right to be heard in open court was violated, plaintiff's civil rights were violated, and the government would have to pay for a written report if it was required. *Id.* at 577-78. (*White Mountain* is also notable as an example of how to tick off a judge--and, apparently, how much one can get away with before a judge says: "Okay, now I mean it; this is *really* your last chance.").

First, the court relied upon the Advisory Committee Notes accompanying the 1970 Amendment to Federal Rule of Civil Procedure 26. The court noted the Claims Court's Rule 26(b)(3)(A) tracked Federal Rule of Civil Procedure 26(b)(4)(A), and that the 1970 Amendment to Federal Rule of Civil Procedure 26 was intended to do away with any argument that the work product doctrine protected expert witness information from discovery.[153] The court cited language of the Advisory Committee Notes that rejected as "ill-considered" those decisions that would extend work product protection to expert information.[154] Though *White Mountain* predates *Intermedics* by seven years, the *White Mountain* court cites the same language from the Advisory Committee Notes the court in *Intermedics* later relied upon.[155]

Second, the court referenced *Beverage Mktg.*, stating "[t]he weight of authority is to the effect that the work product rule does not apply to experts who are expected to testify."[156] *Beverage Mktg.* resurfaces in the "new" rules discovery case *B.C.F. Oil*. *B.C.F. Oil* cites *Beverage Mktg.* for the holding that when a party attempts to use an expert as a witness, and also as a consultant on matters outside the scope of the expert's testimony, the party must clearly differentiate between the expert's role as witness and consultant, otherwise even information shared with the expert in an alleged

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[153] *Id.* (Rule 26(b)(4)(A) is the subdivision of "old" Rule 26 providing for discovery of testifying expert data. RUSCC 26(b)(3)(A) is the same as current RCFC 26(b)(3)(A).).
[154] *Id.*
[155] See *Intermedics*, 139 F.R.D. at 388.
[156] *White Mountain*, 4 Cl.Ct. at 577, citing *Beverage Mktg.*, 563 F.Supp. at 1014.

consultant role will be discoverable.[157] *Beverage Mktg.* also referred to the 1970 Amendment Advisory Committee Notes.[158]

Third, the *White Mountain* court cited a case that preceded the 1970 Amendments, and was referenced by the dissent in *Bogosian*:[159] *United States v. Meyer*, 398 F.2d 66, 73-74 (9th Cir. 1968).[160] The section of *Meyer* referenced by *White Mountain* discussed the Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The language of the committee report is what eventually became the Advisory Committee Notes to the 1970 Amendment.

b. *Abruzzo v. United States*, 21 Cl. Ct. 351 (1990)

White Mountain is later cited in *Abruzzo*, a tax case, as "rejecting work product doctrine as [a] rationale for immunizing expert information from discovery."[161] The *Abruzzo* court's synopsis of the *White Mountain* holding concerning experts and work product comes from the *White Mountain* court's citation to the language of the Advisory Committee Notes accompanying the 1970 Amendment.[162] *Abruzzo's* summary of *White Mountain* read *White Mountain* very broadly in favor of full disclosure.

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[157] *B.C.F. Oil*, 171 F.R.D. at 61-62.
[158] *Beverage Mktg.*, 563 F.Supp. at 1014.
[159] *Bogosian*, 738 F.2d at 599, n.12
[160] *White Mountain*, 4 Cl.Ct. at 577.
[161] *Abruzzo*, 21 Cl.Ct. at 357.
[162] *White Mountain*, 4 Cl.Ct. at 577.

Abruzzo involved a discovery dispute over draft expert witness reports, and the age-old doctrine of "fairness" (also known as "I'll-show-you-mine-if-you-show-me-yours"). Defendant filed numerous discovery requests seeking the reports prepared by the witness plaintiff had identified as its testifying expert.[163] Plaintiff responded it would provide the reports when defendant provided the reports of its expert witness, and filed a motion for a protective order listing four arguments for protection: (1) defendant would unfairly benefit from plaintiff's unilateral production, (2) defendant had not sought a court order requiring production, (3) defendant must demonstrate substantial need for the reports, and (4) draft expert reports are protected by the work product doctrine and attorney-client privilege.[164]

The court went straight to the Claims Court's Rule 26(b)(3) (which the court pointed out was "similar to Rule 26(b)(4) of the ["old"] Federal Rules of Civil Procedure"),[165] and explained the purposes of the Claims Court's Rule 26(b)(3)'s expert witness discovery provisions were to "facilitate preparation of effective cross-examination and rebuttal testimony, and to make the fact-finder's task more manageable by an orderly presentation of complex fact issues."[166] The court explained both the Claims Court's Rule 26(b)(3) and

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[163] *Abruzzo*, 21 Cl.Ct. at 353-55.
[164] *Id.* at 355-57.
[165] *Id.* at 355, citing *White Mountain* (though the fact there are no substantive differences between RUSCC/RCFC 26(b)(3) and "old" FED. R. CIV. P. 26(b)(4) is obvious when the rules are compared.).
[166] *Id.*, citing *Jefferson v. Davis*, 131 F.R.D. 522, 525 (N.D.Ill. 1990).

Federal Rule of Civil Procedure 26(b)(4) provide a two-step approach to expert witness discovery: first, interrogatories are served seeking the witness's identity, opinions, and bases for the opinions; and second, a motion is filed for further discovery, such as depositions or production of expert reports.[167]

Addressing plaintiff's first argument for protection (defendant would unfairly benefit from getting plaintiff's expert reports before plaintiff got defendant's expert reports), the court agreed defendant, if it had not already done so, should have to respond to plaintiff's "first-step" discovery requests before plaintiff should have to respond to defendant's "second-step" requests.[168] However, the court found there was no requirement for mutuality or contemporaneous exchange in the Claims Court's Rule 26(b)(3)(A) or Federal Rule of Civil Procedure 26(b)(4), and plaintiff could not condition production of its expert reports on defendant's production of defendant's expert reports.[169] Like *White Mountain*, the court also cited *Meyer*, stating pre-trial disclosure of expert reports may promote settlement by allowing the parties to be better able to evaluate their positions.[170]

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[167] *Abruzzo*, 21 Cl.Ct. at 355.
[168] *Id.* at 356.
[169] *Id.*
[170] *Id.*

The court answered plaintiff's second argument for protection (defendant did not file a motion to compel) by finding defendant filed a motion to compel after plaintiff filed its motion for protective order.[171] The timing of defendant's motion was sufficient to make plaintiff's second argument moot.[172]

In support of its third argument (defendant did not show a substantial need for the reports), plaintiff relied upon language in a case the court found had been superseded by later cases.[173] The court said a showing of substantial need was not required for either the discovery of draft or final expert reports.[174]

Plaintiff's fourth argument was the work product doctrine protected its draft expert reports.[175] The *Abruzzo* court stated "the weight of authority" did not support using the work product doctrine to protect expert information, citing *White Mountain* as one such authority.[176] The court also cited *In re IBM Peripheral EDP Devices*,[177] a case which specifically allowed discovery of draft reports of expert witnesses, and the 1970 Amendment Advisory Committee Notes circa-1963 condemnation case, *United States v. 23.76*

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[171] *Id.* at 357.
[172] *Id.*
[173] *Id.* The later cases include *In re IBM Peripheral EDP Devices Antitrust Litigation*, 77 F.R.D. 39 (N.D.Cal. 1977) and *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 74 F.R.D. 594 (D.Conn. 1977), cited by *Beverage Mktg. Beverage Mktg.* is in turn cited by *White Mountain* and the "new" rules case, *B.C.F. Oil.*
[174] *Abruzzo*, 21 Cl.Ct. at. 357.
[175] *Id.*
[176] *Id.*
[177] *I.B.M. Peripheral EDP Devices*, 77 F.R.D. at 41, citing *Quadrini*, 74 F.R.D. at 595.

Acres of Land, 32 F.R.D. 593 (D.Md. 1963), for the reading that neither the work product doctrine nor attorney-client privilege protects expert opinions from discovery.[178] After presenting authority the court reads very broadly as allowing for the discovery of work product information from expert witnesses, the court then literally adds a footnote to its decision (perhaps out of fear of being cited): "It should be borne in mind that the court's resolution of the discovery dispute regarding expert reports is not intended to reflect a holding for general application but should be confined to the particularized facts of this case."[179]

In as much as no Court of Federal Claims decision is binding authority, the *Abruzzo* court's footnote is unnecessary (though *Abruzzo* does cite the Court of Federal Claims' decision *White Mountain* to support its position, just as practitioners will continue to cite Court of Federal Claims decisions as "law" to the Court of Federal Claims).[180] Unfortunately, the footnote confuses the court's position on the discovery of expert witness information. With its left hand, the court supplies those favoring the discovery of work product information shared with an expert with ammunition: the court reads the cases it cites very broadly, broader than necessary to resolve the specific issue of whether draft expert reports are discoverable. But with its right hand, the

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[178] *Abruzzo*, 21 Cl.Ct. at 357. See note 205 below for comments regarding why *United States v. 23.76 Acres of Land* is not the best case for arguing broad discovery--though it is cited by the Advisory Committee.
[179] *Id.*, n.3.
[180] See note 140 regarding the authority of Court of Federal Claims decisions.

court takes away its broad statements, writing a footnote that essentially says: "Read our expansive position narrowly."

5. Arguing Protection Versus Disclosure to the Court of Federal Claims

Coupled with *White Mountain*, *Abruzzo* certainly argues for broad discovery from expert witnesses. However, neither case is a government contract case, and neither case is binding precedent on the Court of Federal Claims. Additionally, the Court of Federal Claims rule addressing expert witness discovery, RCFC 26(b)(3), is still patterned after "old" Federal Rule of Civil Procedure 26(b)(4)(A), and does not contain the broader discovery provisions of "new" Rule 26. Therefore, the reasoning of the "old" rules federal cases will track the language of RCFC 26(b)(3). As long as RCFC 26(b)(3) remains "old," the "new" rules cases, especially where their arguments depend upon the changes made by the 1993 Amendments, will not be a good fit when arguing expert discovery issues before the Court of Federal Claims. Some of the reasoning of the "new" rules cases may apply, but the cases themselves are tied to language which has not yet made its way into RCFC 26(b)(3).

For attorneys practicing in front of the Court of Federal Claims, it is "good news/bad news." The bad news first: there is no bright line rule stating

whether work product shared with a testifying expert will be protected or discoverable. A party who shares work product with a testifying expert runs a real risk of having to share the work product with the opposing party, as well. Now the good news: the more familiar an attorney is with the historical federal court arguments addressing the discovery of work product shared with an expert witness, the more ammunition the attorney has for arguing the outcome the attorney desires. Without a bright line rule, any outcome is possible--and the best-reasoned argument should win. The reasoning has already been done, and is available from the "old" rules federal court decisions.[181]

B. The Boards of Contract Appeals

1. No Rule Equivalent to Federal Rule of Civil Procedure 26

None of the boards of contract appeals have a rule even roughly equivalent to Federal Rule of Civil Procedure 26. Most of the boards have discovery rules following the Final Uniform Rules of Procedure for Boards of Contract Appeals under the Contract Disputes Act of 1978.[182] Board rules typically address the procedures for depositions, interrogatories, requests for admission, requests for documents, subpoenas, and sanctions for discovery

[181] If your personality type requires certainty to function, flee from the Court of Federal Claims.

[182] Peacock, *Discovery Before Boards of Contract Appeals*, 13 PUB. CONT. L. J. 1, 70 n.2 (1982).

violations, but no board rules specifically deal with the issue of discovery regarding information shared with testifying experts.[183]

2. Reliance on Federal Rule of Civil Procedure 26

The boards of contract appeals only cite Federal Rule of Civil Procedure 26 in about 80 cases, the majority of those citations addressing the general scope of discovery or the work product limitations of subdivision 26(b)(3). One case, *Charlesgate Constr. Co.*, LBCA Nos. 96-BCA-2 *et al.*, 1997 WL 191845 (April 7, 1997), cites "new" Rule 26(b)(5) to support its holding that appellant must specifically identify any documents withheld under a claim of privilege or work product protection, though the government's instructions for answering its document request also required such specific identification.[184]

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[183] For example, the Armed Services Board of Contract Appeals (whose discovery rules nearly mirror the language of the Final Uniform Rules of Procedure for Boards of Contract Appeals) has a rule for depositions (Rule 14, "Discovery - Depositions," which has subsections entitled: "General Policy and Protective Orders," "When Depositions Permitted," "Orders on Depositions," "Use as Evidence," "Expenses," and "Subpoenas"); a rule for interrogatories, requests for admissions, and requests for documents (Rule 15, "Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents"); a rule for subpoenas (Rule 21); and a rule for sanctions (Rule 35).

[184] *Charlesgate Constr. Co.*, LBCA Nos. 96-BCA-2 *et al.*, 1997 WL 191845 at pp. 4-5 (April 7, 1997). In *Charlesgate*, as part of the instructions accompanying its document discovery request, the government requested appellant to specifically identify any documents appellant claimed were privileged. *Id.* at p. 1. Appellant responded to the government's discovery request by ignoring the instruction, and making a general objection for all documents protected by the attorney-client privilege or the work product doctrine. *Id.* at p. 2. The government filed a motion to compel responses in accordance with its instructions, and appellant responded it was under no obligation to specifically identify documents withheld as privileged. *Id.* at p. 4. Without citing a board order or a board rule applying the requirements of FED. R. CIV. P. 26(b)(5), the board held that "new" Rule 26(b)(5) required appellant to identify with specificity the documents withheld under a claim of privilege. *Id.* at pp. 4-5. (See note 148 for the text of FED. R. CIV. P. 26(b)(5).).

Of the remaining cases that explore the application of Federal Rule of Civil Procedure 26 to expert discovery of any type,[185] none address as their primary focus the conflict between the work product doctrine and full disclosure of materials shared with a testifying expert. One case does state, under "old" Federal Rule of Civil Procedure 26, that all information given to a testifying expert is discoverable, though the case itself concerns the discovery of *non*testifying expert information.[186]

Also, nearly all the board cases dealing with expert witness discovery address "old" Federal Rule of Civil Procedure 26. Some boards have favorably cited the "new" rules handling of expert witness discovery, though

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[185] *Adelaide Blomfield Management Co. v. Gen. Serv. Admin.*, GSBCA No. 13125, 96-1 BCA ¶ 28,267 (denying appellant's motion to call as its own rebuttal expert witness a government nontestifying expert); *Ed A. Wilson, Inc. v. Gen. Serv. Admin.*, GSBCA No. 12596, 94-3 BCA ¶ 26,998 (work product under Rule 26(b)(3) defined); *Golden West Ref. Co.*, EBCA Nos. C-9208134 *et al*, 94-1 BCA ¶ 26,319 (sanctions for incomplete disclosure); *Fed. Ins. Co.*, IBCA Nos. 3236 *et al*, 1993 WL 566096 (Dec. 22, 1993) (finding an expert report is a good idea); *Charles G. Williams Const., Inc.*, ASBCA No. 33766, 89-2 BCA ¶ 21,733 (government failure to identify existence of technical report resulted in expert testimony being struck); *Coastal Structures, Inc.*, DOTCAB Nos. 1670 *et al*, 88-3 BCA ¶ 20,956 (late identification of an expert witness); *Ealahan Elec. Co., Inc.*, DOTCAB Nos. 1896 and 1959, 88-2 BCA ¶ 20,592 (must identify documents withheld as work product); *Southwest Marine, Inc.*, DOTCAB Nos. 1497 *et al*, 87-1 BCA ¶ 19,583 (discovery from nontestifying experts); *Gen. Distrib. Serv.*, GSBCA No. 8187-TD, 86-3 BCA ¶ 19,197 (limits on deposition questions of expert); *Monitor Northwest Co.*, GSBCA No. 7028, 85-1 BCA ¶ 17,851 (duty to supplement expert information); *Space Age Eng'g, Inc.*, ASBCA Nos. 25761 *et al*, 83-1 BCA ¶ 16,385 (duty to supplement expert information); *Cleveland Superior Co.*, GSBCA Nos. 6407 and 6291, 82-2 BCA ¶ 15,800 (adequacy of expert information produced); *Blount Bros. Corp.*, NASA BCA No. 279-2, 1979 WL 22341 (Aug. 31, 1979) (identification of expert witnesses and the facts upon which opinions based); and *Woerfel Corp. and Towne Realty Co.*, NASA BCA No. 1073-13, 75-2 BCA ¶ 11,628 ("old" rules only allowed deposition of expert with leave of court).

[186] *Donald C. Hubbs, Inc.*, DOTCAB Nos. 2012 *et al.*, 89-2 BCA ¶ 21,740.

they have either not imposed the specific requirements of Federal Rule of Civil Procedure 26(a)(2),[187] or addressed nontestifying experts.[188]

3. Reliance on the Key Federal Court Cases

No board of contract appeals cites *Intermedics*, *Karn*, *B.C.F. Oil*, or *Haworth*, though, as will be discussed below, the reasoning of those cases is evident. One case, *Donald C. Hubbs, Inc.*, DOTCAB Nos. 2012 *et al.*, 89-2 BCA ¶ 21,740, does rely on two federal cases later cited by *Intermedics* in *Intermedics*' arguments for full disclosure.[189]

One inadvertent disclosure case, *Southwest Marine, Inc.*, DOTCAB Nos. 1497 *et al*, 87-2 BCA ¶ 19,769, references *Bogosian* (however, the case misspells it "Bogasian," and cites it as *"Bogasian v. Gulf Oil Cap.*," instead of "*Corp.*").[190] *Southwest* erroneously cites *Bogosian* as an example of a case "holding that disclosure of confidential material by an attorney to his expert

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[187] *Fed. Ins. Co.*, IBCA Nos. 3236 *et al*, 1993 WL 566096 (Dec. 22, 1993), cites "new" Rule 26(a)(2) (disclosure of expert testimony) as good general guidance for expert discovery, but then declines to require a written expert report, though the board says such a report would be a good idea.

[188] *Adelaide*, 96-1 BCA at 141,142, cites "new" Rule 26(b)(4)(B) (discovery from nontestifying experts) in denying appellant's motion to call a government nontestifying expert as appellant's own rebuttal expert witness. But "new" Rule 26(b)(4)(B) is practically the same as the "old" Rule. (See note 24 for the text of the "new" Rule, and note 196 for the text of the "old" Rule.).

[189] *Hubbs*, 89-2 BCA at 109,404 cites *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740 (E.D. Mo. 1983) (cited by *Intermedics*, 139 F.R.D. at 387, n.3) (if a testifying expert relies upon the report of a nontestifying expert, the nontestifying expert's report is discoverable); and *Hubbs* at 109,403 and 404 cites *Eliasen v. Hamilton*, 111 F.R.D. 396 (N.D.Ill. 1986) (cited by *Intermedics*, 139 F.R.D. at 390, n.6, and 393, n.11) (lack of ability to obtain equivalent information independently is an "exceptional circumstance" permitting discovery from a nontestifying expert).

[190] *Southwest*, 87-2 BCA at 100,030.

witness does not waive the attorney-client privilege,"[191] when the *Bogosian* holding had nothing to do with the attorney-client privilege, but dealt exclusively with the work product doctrine. *Southwest* does not rely upon *Bogosian* in reaching its holding, and *Southwest's* treatment of *Bogosian* sheds no light on how the boards might treat *Bogosian* in the future. Some practitioners perceived that before the 1993 Amendments, the boards were prone to read the expert discovery provisions of Federal Rule of Civil Procedure 26 in a protectionist manner,[192] which would be consistent with *Bogosian* and its progeny.

4. The Board Cases

a. *Donald C. Hubbs, Inc.*, DOTCAB Nos. 2012 *et al.*, 89-2 BCA ¶ 21,740

In *Hubbs*, the board had before it issues related to *non*testifying expert discovery. However, in answering the question of how far the protection of nontestifying expert information extending, the board also addressed the discovery of data relied upon by testifying experts.

The dispute between appellant and the government in *Hubbs* arose out of the government requiring appellant to resurface a highway constructed by

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[191] *Id.*
[192] Simchak, *Expediting the BCA Case*, Federal Contracts Report, Sept. 29, 1986, Vol. 26, 584, at 586.

appellant because the government believed the highway's surface did not meet contract requirements for smoothness.[193] Appellant resurfaced the highway at the government's direction, and filed a claim for the cost of its extra work.[194]

The government submitted several interrogatories and document requests to appellant requesting information related to any testing appellant did on the highway both before and after appellant resurfaced the highway.[195] Appellant responded to the discovery requests by stating under "old" Federal Rule of Civil Procedure 26(b)(4)(B),[196] the information was exempt from production because: (1) the only tests performed were performed by experts at the direction of appellant's counsel, (2) the experts would not be testifying at trial regarding the tests, (3) the tests would not be offered at trial, and (4) the government could run its own tests.[197] The government filed a motion to compel responses to its requests.[198] Appellant, in its reply to the motion,

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[193] *Hubbs*, 89-2 BCA at 109,396.
[194] *Id.*
[195] *Id.* at 109,396-97.
[196] "Old" Rule 26(b)(4)(B) stated:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

"New" Rule 26(b)(4)(B) is the same with the exception of "through interrogatories or by deposition" being inserted after "A party may. . . ." PROPOSED RULES, 137 F.R.D. at 93.
[197] *Hubbs*, 89-2 BCA at 109,397.
[198] *Id.* at 109,396.

stated its tests were done after the highway was resurfaced by a firm named LaBelle-Marvin, Inc., and LaBelle-Marvin's president would be testifying at trial as an expert regarding the government's testing methods, but not in regard to the tests performed by LaBelle-Marvin.[199]

The board relied upon "old" Federal Rule of Civil Procedure 26(b)(4)(B), stating that though the Federal Rules of Civil Procedure were not binding on the Department of Transportation Contract Appeals Board, the board had chosen to apply Federal Rule of Civil Procedure 26(b)(4)(B) in the absence of a board rule on point.[200] The board noted any tests performed by appellant after the government directed appellant to resurface the highway were performed "in anticipation of litigation," as the term is used in Federal Rule of Civil Procedure 26(b)(4)(B).[201]

The board then addressed the issue of whether the identities of nontestifying experts should be discoverable, citing *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F.Supp. 1122, 1137 (S.D.Tex. 1976) for the premise that "the purpose of Rule 26(b)(4)(B) was to abolish the notion that an expert's information was protected as 'privileged' or as 'work product,' replacing those

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[199] *Id.* at 109,397.
[200] *Id.* at 109,398, citing *Southwest Marine, Inc.*, DOTCAB Nos. 1497 *et al.*, 87-1 BCA ¶ 19,583.
[201] *Hubbs*, 89-2 BCA at 109,399. The board also said if the tests were performed by appellant's general employees instead of by experts, "the results of those tests would not be privileged," *Id.* (apparently because Rule 26(b)(4)(B) does not cover general employees). However, if the tests were performed in anticipation of litigation, Rule 26(b)(3) might very well protect them, regardless of whether they were performed by non-experts.

notions with a rule of application on the doctrine of 'unfairness.'"[202] *Pearl Brewing*, in turn, cited the Advisory Committee Notes accompanying the 1970 Amendment for its statement that Federal Rule of Civil Procedure 26(b)(4)(B) was adopted to eliminate the application of work product protection to the discovery of expert information.[203] (Actually, the Advisory Committee Notes read: "These new provisions of subdivision *(b)(4)* repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert. . . ."[204] (emphasis added). In the context of the Advisory Committee Notes, "subdivision (b)(4)" includes at least (b)(4)(A) and (b)(4)(B).[205])

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[202] *Id.* at 109,401-02.
[203] *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F.Supp. 1122, 1137 (S.D.Tex. 1976).
[204] FED. R. CIV. PRO. 26, ADVISORY COMMITTEE NOTES, 1970 Amendment.
[205] The nontestifying expert provisions of 26(b)(4)(B) alone cannot be read to open the door for broad discovery of expert witness information. In fact, it is the special *protection* extending to nontestifying experts in subdivision (b)(4)(B), coupled with the 1993 Amendments changes to *testifying* expert discovery, that supports the full disclosure of testifying expert information. The *non*testifying expert protections of (b)(4)(B) were left virtually unchanged by the 1993 Amendments. Also, the Advisory Committee Notes to the 1970 Amendment liberally interpret the cases they have chosen to cite regarding the discoverability of expert information. The Advisory Committee cites *American Oil Co. v. Pennsylvania Petroleum Prods. Co.*, 23 F.R.D. 680, 685-86 (D.R.I. 1959) as an example of a case holding an expert's information is protected simply because of his status as an expert, but in *American Oil* it appears the expert at issue was a nontestifying expert, and the *American Oil* court denied discovery citing cases addressing the fairness of one party gaining information for free at the expense of another party. *American Oil*, 23 F.R.D. at 685-86. (At issue in *American Oil* was an allegation of contaminated fuel oil. The plaintiff propounded the following interrogatory: "Identify the foreign substances allegedly contaminating the fuel oil delivered by the plaintiff to the defendant." *Id.* at 685. Defendant objected to the interrogatory, claiming the interrogatory sought the opinions of experts employed by defendant, and that defendant had provided plaintiff with fuel oil samples which plaintiff could have its own experts analyze. *Id.* In sustaining defendant's objection, the court did say the information sought was privileged, but the court supported its holding by quoting *Lewis v. United Air Lines Transport Corp.*, 32 F.Supp. 21, 23 (W.D.Pa. 1940), and *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376, 378-79 (D.N.J. 1954) regarding the unfairness of one party getting expert information at the economic expense of the other. Further, in *Walsh*, the court *allowed* discovery of some of the expert information sought, indicating that the status of the witness as an expert was not enough alone to deny discovery. *American Oil*, 23 F.R.D. at 685.) The Advisory Committee also cites *United States v. McKay,* 372 F.2d 174, 176-77 (5th Cir. 1967) as an example of a case holding the work product doctrine should not

After holding the identity of *non*testifying experts who are retained or employed in anticipation of litigation must be produced in discovery,[206] the board turned its attention to whether the results of the testing, and the facts known and opinions held by the nontestifying experts, were discoverable. As to the results of the testing, the board held if a party can conduct the same tests its opponent conducted, then the results of its opponent's testing will normally be protected from discovery.[207]

The board then addressed one major exception to the protection of nontestifying expert information, citing *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740 (E.D.Mo. 1983), later cited by *Intermedics*:

> When an expert who will be testifying relies on a report prepared by a non-testifying expert, then the privilege afforded by Rule 26(b)(4)(B) is waived. All documents used by testifying experts must

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protect expert information from discovery, but the *McKay* court's holding actually turned on a Treasury Regulation which provided the I.R.S. with "extra" discovery powers--*McKay* mentions the application of work product protection under *Hickman* in dicta. *McKay*, 372 F.2d at 175-76. Finally, the Advisory Committee cites *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md. 1963) as an example of the developing doctrine of "unfairness." In *23.76 Acres of Land*, the expert at issue appears to be a testifying expert in the highly specialized area of federal condemnation cases. *Id.* at 594. The court itself says that "[a]ny discussion of unfairness should begin with a consideration of the issues presented in a federal condemnation case," and then explains how the one-sided nature of the government's exercise of eminent domain demands full discovery of experts, just as the state law of Maryland already requires. *Id.* at 597. (Though *23.76 Acres of Land* is an interesting case, more interesting still if the government wants to put a missile silo in your backyard, it relates to the specialized field of federal condemnation cases, begging the question: Why, if other, more general civil litigation cases existed, did the committee not cite them instead?).

[206] *Hubbs*, 89-2 BCA at 109,402. The identity of nontestifying experts was important because it allowed the requesting party to determine the status of the experts for purposes of discovery: were they informally consulted, were they specially employed, were they employed in anticipation of litigation? *Id.* at 109,401.

[207] *Id.* at 109,403.

be produced where necessary for effective cross-examination, regardless of by whom they have been generated.[208]

Though specifically ruling on whether the testing done by nontestifying experts is discoverable, the board broadly stated all documents used by testifying experts were discoverable.

In appellant's response to the government's motion to compel, appellant stated if its expert were to testify at his deposition he "reviewed, considered, or in any way relied upon" any of the tests performed by the nontestifying experts at LaBelle-Marvin, appellant would voluntarily make the tests available to the government.[209] The board apparently ignored appellant's statements regarding "reviewed" or "considered," and instead said it was reasonable to assume appellant's expert, given the description of his activities in his resume and his job duties as president of LaBelle-Marvin, must have at least read the results of the tests, "if indeed, he did not actively participate in performing them."[210] The board also said it "decline[d] to hold that the [government] can only obtain the results of the LaBelle-Marvin tests if [the expert witness] testifies at his deposition that he relied on them,"[211]

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[208] *Id.* at 109,404.
[209] *Id.* at 109,403 (quoting appellant's reply to the government's motion). Appellant obviously believed its testifying expert had not reviewed the tests, or appellant would have produced the test results in response to the government's discovery request, rather than opposing the government's discovery request and promising to provide the test results in the future if it came out that appellant's expert had reviewed them.
[210] *Id.* at 109,404.
[211] *Id.*

though appellant never asked the board to restrict discovery to information its expert relied upon.

After assuming the expert witness reviewed the results of the tests, the board said no one, including the witness, could determine what effect the witness's review of the results would have on his expert testimony.[212] The board then envisioned possible scenarios which might affect the expert's testimony, involving various levels of knowledge regarding the tests.[213] The board said even if the expert did not use the test results in reaching his expert opinions, the fact he rejected their use could make the test results as important, or more important, to cross-examination than if the expert *had* used them.[214]

Since the board finds both documents an expert witness makes use of and documents the expert witness rejects are discoverable, the board holds "any opinions of non-testifying experts which a testifying expert has reviewed are properly discoverable, as essential for cross-examination."[215] This is the true holding of *Hubbs* regarding the discovery of nontestifying expert information. But the board gets to the holding by assuming appellant's expert witness reviewed the test results. A broad reading of *Hubbs* would entitle a party to

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[212] *Id.*
[213] *Id.* For none of these scenarios does the board provide facts indicating appellant's testifying expert actually took the actions the board envisions.
[214] *Id.*, citing *Eliasen v. Hamilton*, 111 F.R.D. 396 n.5 (N.D.Ill. 1986) (cited by *Intermedics*, 139 F.R.D. at 390 n.6, and 393 n.11).
[215] *Hubbs*, 89-2 BCA at 109,404.

discovery of any nontestifying expert information that a testifying expert might be reasonably assumed to have reviewed.

Much of the reasoning the board goes through, though relevant in a case where the parties are arguing over whether an expert witness actually looked at a document, is premature before it is established the expert reviewed a particular document. As a result, though the language of *Hubbs* clearly favors full disclosure of information shared with an expert witness, the rationale behind the language is not tied securely to the facts of the case. The most direct approach in *Hubbs* would have been for the board to order appellant to comply with the statement in appellant's response to the government's motion, and allow the government to depose appellant's expert regarding his knowledge of the test results. If the expert witness stated he had reviewed or seen or known about the test results, appellant would then have had to produce them. If the expert witness testified he was unaware of what the test results were, had never seen them, had never been told about them, or had no part in performing them, then there would have been no basis for ordering appellant to provide the test results to the government.

The board jumped the gun by stating the expert must have looked at the test results, going so far as to claim he probably actively participated in the testing--while indications from appellant were the expert had not. A

deposition under oath would have answered the question, and would have made *Hubbs* a clearer case.[216]

Still, *Hubbs* lines up with the reasoning of the "new" Rule 26 cases that favor full disclosure of all information shared with an expert witness, whether the expert relied upon the information or not. Even though *Hubbs* pre-dated "new" Rule 26, *Hubbs* agrees that even the documents an expert witness rejects in forming the expert's opinions should be discoverable,[217] supporting a reading of "new" Rule 26(a)(2)'s use of the word "considered" as mandating disclosure of information an expert witness looks at but does not rely upon in forming the expert's opinions (just as *B.C.F. Oil* and *Karn* hold).[218]

b. ***Cleveland Superior Co.*, GSBCA Nos. 6407, 6291, 82-2 BCA ¶ 15,800**

In *Cleveland*, the General Services Board of Contract Appeals stated its understanding that "old" Federal Rule of Civil Procedure 26, coupled with the Federal Rules of Evidence, was intended to allow for broad discovery of expert witness data.[219] At issue in *Cleveland* was a motion to compel appellant to provide more complete responses to government interrogatories

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[216] People do lie under oath, of course (except to Perry Mason on cross), but a board or court should at least allow a person to *make* a statement, and then critically examine the statement--rather than assuming the statement will be a lie.
[217] *Hubbs*, 89-2 BCA at 109,404, citing *Eliasen*, 111 F.R.D. 396 n.5.
[218] *B.C.F. Oil*, 171 F.R.D. at 66-67; *Karn*, 168 F.R.D. at 635. Even *Haworth* holds that all factual information considered by an expert witness, whether the witness relies upon it or not, is discoverable under "new" Rule 26(a)(2). *Haworth*, 162 F.R.D. at 296.
[219] *Cleveland*, 82-2 BCA at 78,252.

requesting expert witness information.[220] In its responses, appellant had failed to specifically identify who all of its testifying experts would be, but had instead stated someone from Arthur Anderson and Company would testify.[221] In granting the government's motion to compel and ordering appellant to provide the identity of the expert from Arthur Anderson and Company who would testify, and copies of all documents the expert witness used in formulating or expressing the witness's opinions, the board examined the purposes behind "old" Rule 26 and the Federal Rules of Evidence.

The board cited the Advisory Committee Notes accompanying "old" Rule 26 for the premise that broad discovery of expert witness information was required because "(e)ffective cross-examination of an expert witness requires advance preparation' and "effective rebuttal requires advance knowledge of the line of testimony of the other side."[222] The board also cited Federal Rules of Evidence 703 (Bases of Opinion Testimony by Experts) and 705 (Disclosure of Facts or Data Underlying Expert Opinion), which had only been in effect for about seven years, to emphasize how cross-examination had become the chosen tool for testing the facts and assumptions forming the foundation of an expert witness's testimony.[223]

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[220] *Id.* at 78,251.
[221] *Id.*
[222] *Id.* at 78,252 (quoting the Advisory Committee Notes to the 1970 Amendment to the Federal Rules of Civil Procedure).
[223] *Id.*

Though the question of whether work product documents utilized by an expert witness in forming the expert's opinions are discoverable was not raised in *Cleveland*, the reasoning employed by the board in answering the discovery questions before it mirrored the reasoning employed by the federal courts favoring disclosure. The "old" rules disclosure-oriented federal courts argued the Federal Rules of Civil Procedure and Evidence contemplated full discovery of data shared with a testifying expert in order for the bases of an expert's opinion to be tested effectively through cross-examination,[224] and the "tight interdependence between the operation of paragraph (4) of Rule 26(b) . . . and Rules of Evidence 702, 703, and 705" was a basis for full disclosure.[225]

In *Gulf & Western Indus., Inc.*, ASBCA No. 21090, 80-1 BCA ¶ 14,304, one of the board's numerous findings of fact includes a reference to Federal Rule of Evidence 705, requiring all facts or data upon which an expert witness bases his or her opinions to be disclosed in discovery. The board was not addressing an issue of expert witness discovery in its opinion, but the reference to Rule 705 is in accord with the reasoning of *Cleveland*, and shows the rules of evidence, not just the rules of procedure, can be applied to expert witness discovery arguments.

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[224] *Intermedics*, 139 F.R.D. at 394. (Also, see the dissenting opinion in *Bogosian.*).
[225] *Id.*

The "new" rules disclosure-oriented federal courts employ the reasoning of *Cleveland*, as well. *Karn* presents the need for effective cross-examination as an underlying premise of the "new" rule preference for the full disclosure of data considered by an expert witness.[226] *B.C.F. Oil Refining* also relies upon the Advisory Committee Notes to "new" Rule 26, which explain full disclosure is necessitated by the need for effective cross-examination of expert witnesses.[227]

c. *General Distribution Services*, GSBCA No. 8187-TD, 86-3 BCA ¶ 19,197

The *Cleveland* premise that the discovery of information shared with an expert witness should be broad enough to allow for effective cross-examination is apparently restated by the General Services Board of Contract Appeals, with limitations, in *General Distrib. Serv.* The board in *General* specifically addressed the allowable scope of deposition questions asked by the government of appellant's expert witness. The questions appellant objected to were hypothetical questions seeking opinions about "facts" the expert had not based his expert opinions upon.[228]

The board, in line with *Cleveland*, affirms the purpose of "old" Federal Rule of Civil Procedure 26(b)(4)(A) was "to facilitate cross examination and rebuttal

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[226] *Karn*, 168 F.R.D. at 639.
[227] *B.C.F. Oil*, 171 F.R.D. at 66.
[228] *General*, 86-3 BCA at 97,096-97.

of experts at trial."[229] However, though the deposition questions objected to by appellant only sought to obtain answers to hypothetical questions regarding "facts" the expert had not depended upon in forming his opinions, *General* upheld appellant's objection to the questions with the broad statement that "old" Rule 26 "does not contemplate a party, by deposition or otherwise, *conducting a preliminary cross examination* of the other party's expert or obtaining the opinion of the expert on facts other than those on which the expert will shape his testimony."[230] (emphasis added)

The government relied upon *Cleveland* in arguing its deposition questions were within the scope of Rule 26.[231] The board stated the government's reliance upon *Cleveland* was misplaced because the government's questions went beyond the limits of Rule 26.[232]

The limits of Rule 26 the *General* board referred to are unfortunately unclear as the board used broader language than it needed to in upholding appellant's objection to the government's questions. The board could have used part of the language of its holding, and merely upheld the objection based upon the government's attempt to obtain "the opinion of the expert on

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[229] *Id.* at 97,097 (citing 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2030 (1970)).
[230] *Id.* at 97,098 (citing *Knighton v. Villiam & Fassio e Compagnia Internazionale di Genova Societe Riuniti di Navigazione, S.p.a.*, 39 F.R.D. 11, 13-14 (D.Ind. 1965)).
[231] *Id.*
[232] *Id.*

facts other than those on which the expert will shape his testimony,"[233] providing a relatively clear limitation. Instead, after stating, like *Cleveland*, that the purpose of "old" Rule 26 was to facilitate cross-examination at trial, the board went on to say the rule's purpose did not allow "preliminary" cross-examination at deposition. What *General* meant by "preliminary" cross-examination is open to anybody's guess.

d. *Ealahan Electric Co., Inc.*, DOTCAB Nos. 1896, 1959, 88-2 BCA ¶ 20,592

In *Ealahan*, the Department of Transportation Contract Appeals Board also cited *Cleveland*, stating in dicta "[r]espondent should . . . take notice that the ["old"] federal rules permit broad discovery of experts who will be called to testify at a hearing."[234] In *Ealahan*, appellant responded to some of the government's interrogatories and requests for documents by claiming the information requested either had already been provided or was privileged, without identifying the documents appellant claimed were privileged.[235] The government argued the withheld documents were not work product, and appellant must identify the documents.[236] After holding appellant must specifically identify the documents appellant claimed were protected by "the

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[233] *Id.*
[234] *Ealahan*, 88-2 BCA at 104,077.
[235] *Id.* at 104,076.
[236] *Id.* at 104,077.

work-product privilege [sic]",[237] the board went on to say that once the work product documents were identified, the government could then decide whether to challenge appellant's designation of the documents as work product.[238]

In anticipation of the government possibly renewing its challenge to appellant's assertion of work product protection for some of the documents once the documents were specifically identified, the board advised the government the work product doctrine was broader than the government had defined it in the government's initial motion to compel answers to its interrogatories and requests for documents.[239] The board then directed the government to *Cleveland* for the proposition that the Federal Rules of Civil Procedure "permit broad discovery of [testifying] experts. . . ."[240] The board ended its opinion by referring to the expert discovery allowed by "old" Rule

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[237] *Id.* As is pointed out in *Ed A. Wilson, Inc. v. Gen'l Serv. Admin.*, GSBCA No. 12596, 94-3 BCA ¶ 26,998 at 134,491, protection for work product is a qualified immunity rather than a privilege. (*Ed A. Wilson* also provides an excellent example of how a lawyer can shoot himself or herself in the foot, or other more vital body part, by failing to protect documents the client wants protected: when the board requested copies of the documents appellant claimed were protected from discovery for an *in camera* review, appellant's lawyer mistakenly sent copies of the documents to the government's lawyer. The board called this "waiver." The case does not share what the client called it.).

[238] *Ealahan*, 88-2 BCA at 104,077. Even though *Ealahan* pre-dates "new" Rule 26(b)(5) (requiring the identification of all communications withheld during discovery under a claim of privilege or work product protection), the board required appellant to identify the documents appellant refused to produce in discovery, which appellant claimed were protected by the work product doctrine. *Id.* Even without "new" Rule 26(b)(5), the board recognized documents a party asserted were protected by the work product doctrine must be identified in order for the opposing party to be able to determine whether to challenge the asserted protection of the documents, and in order for the board to rule on whether the protection was correctly asserted. (See note 148 for the text of FED. R. CIV. P. 26(b)(5).).

[239] *Id.*

[240] *Id.*

26(b)(4), and stating discovery outside the limits of Rule 26(b)(4) would only be permitted by board order.[241]

e. *Charles G. Williams Construction, Inc.*, ASBCA No. 33766, 89-2 BCA ¶ 21,733

In *Charles G. Williams*, the Armed Services Board of Contract Appeals sanctioned the government for failing to identify a technical analysis prepared by the government's expert witness. During the hearing, appellant learned for the first time the government had prepared a technical analysis of appellant's claim, after appellant had asked for any such technical analyses during discovery.[242] The government apparently assumed the technical analysis prepared by its expert witness was privileged; however, the government never identified the document in discovery, but instead sought to "protect" it by denying it existed.[243] Once it came out at hearing that the technical analysis did exist, the government then asserted in its response to appellant's motion for sanctions that the analysis was privileged.[244] In ruling on appellant's motion for sanctions, the board said, "We agree with appellant that the Government's belated claim of privilege is nothing more than an attempt to justify depriving appellant of discoverable information."[245]

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[241] *Id.*
[242] *Charles G. Williams*, 89-2 BCA at 109,248.
[243] *Id.* at 109,249.
[244] *Id.*
[245] *Id.* The board sanctioned the government's failure to identify the existence of the technical report, when it was specifically requested by appellant, by refusing to give any weight to the testimony of the government's expert witness. *Id.* at 109,249-50. (If a party requested all documents examined by an expert witness--even without applying the requirements of "new" Rule 26(b)(5)--under the holding of *Charles G. Williams*, the opposing

The board does not explain why the technical analysis was "discoverable information." *Charles G. Williams* pre-dates the "new" rules, so even if the board had applied the expert witness discovery requirements of "old" Federal Rule of Civil Procedure 26, there was no "old" Rule requirement for an expert report to be provided. As the board cited no government violation of a board order, it appears the board had not required the parties to submit expert reports for testifying experts, since the government expert's technical analysis would qualify as such.

Nor does the board cite the specific discovery requests under which appellant should have received the technical analysis. The government's expert witness apparently testified to matters contained within the technical analysis, but the board does not share whether appellant had requested through interrogatories that the government (under "old" Rule 26(b)(4)(A)) "state the subject matter on which the expert is expected to testify, and . . . the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."[246] It appears appellant requested the technical analysis through a specific document request for any technical analyses, but the board does not cite the request.

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party could not refuse to identify a document the opposing party asserted was protected by the work product doctrine.).

[246] PROPOSED RULES, 137 F.R.D. at 93.

Without knowing the specific request for the technical analysis which the government ignored, it is unclear why the board believed the technical analysis was "discoverable information." Though the government belatedly argued the analysis was privileged under "old" Rule 26(b)(1),[247] and did not raise the issue of work product protection under Rule 26(b)(3), a work product protection argument may have applied.

5. Arguing Protection Versus Disclosure to the Boards of Contract Appeals

Hubbs represents the front line board case for arguing full disclosure. Though the question in *Hubbs* specifically addressed whether the opinions of non-testifying experts that a testifying expert reviews are discoverable, the holding in *Hubbs* can be read broadly as allowing the discovery of any nontestifying expert information that a testifying expert might be reasonably assumed to have reviewed. Such nontestifying expert information would almost certainly include opinion work product. One problem with arguing *Hubbs* as a basis for full disclosure is the *Hubbs* holding was not even grounded on the facts of *Hubbs* (the board assumed the expert reviewed information the expert may not have actually reviewed), making it more difficult to analogize one's own facts to those of *Hubbs*.

[247] *Charles G. Williams*, 89-2 BCA at 109,249.

Cleveland, *General*, and *Ealahan* all recognize "old" Rule 26 as providing for broad discovery of expert witness information, but none define whether broad discovery includes work product shared with an expert witness. The reasoning of *Cleveland* could be used to support an argument for full discovery, arguing dependence upon cross-examination to test the bases of an expert's opinions mandates discovery of all information shared with an expert. Otherwise, the cross-examiner would be unable to explore everything that may have influenced an expert's opinions, and would be left with the expert's own beliefs about what the expert thinks influenced him or her. The "extra" statement of the board in *General* regarding "preliminary" cross-examination could be used to support protection by arguing the discovery of expert witness information through deposition is limited to questions that go to an expert witness's stated bases for his or her opinions, and that questions any broader in scope are prohibited "preliminary" cross-examination.

In *Charles G. Williams*, if the board considered the technical analysis to be discoverable because the analysis was prepared by or relied upon by the government's testifying expert, then *Charles G. Williams* would support full disclosure of otherwise privileged or protected data relating to an expert witness's opinions. Unfortunately, the board does not state why the technical analysis was discoverable, and the board therefore may have considered the analysis discoverable regardless of whether the government's expert testified

or not. The board's sanction in the case went directly to the government's use of its expert: "[T]he proper remedy is to refuse to give any weight to [the expert's] testimony or to any of his documents and to bar the use of either by the Government in defense of appellant's claim."[248] Though the board struggled with what sanction to apply, since the board believed the greatest prejudice to appellant to be the loss of pre-hearing good faith negotiations and delay of the contracting officer's final decision (as the contracting officer was waiting on the technical analysis to be completed before issuing the final decision),[249] the board's sanction nonetheless reflects the position that expert testimony must be preceded by full disclosure of data relevant to the expert's opinions.[250]

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[248] *Id.* at 109,250.

[249] *Id.*

[250] Also, applying the reasoning of *Charlesgate* (see note 184), *Ealahan* (see note 238), and *Charles G. Williams* (see note 245) to the discovery of work product shown to an expert witness should result in at least identifying what the expert witness saw, as "new" Rule 26(b)(5) (text at note 148) requires. Even if a party requesting discovery is unsure of whether a judge is willing to apply Federal Rule of Civil Procedure 26(b)(5), the party can include as part of its discovery request the requirements contained within subdivision (b)(5). A party could request all documents shared with an opposing party's expert witness, and a description of any documents withheld under a claim of privilege or work product "in a manner that, without revealing information itself privileged or protected, will enable [an assessment of] the applicability of the privilege or protection." FED. R. CIV. P. 26(b)(5). Additionally, if expert reports are required using the guidance of "new" FED. R. CIV. P. 26(a)(2)(B) (text at note 2), an expert witness must prepare a written report containing a complete statement of the data considered by the witness. Coupled with subdivision 26(a)(2)(B), subdivision 26(b)(5) automatically requires a party to identify each "document, communication, or thing" that was considered by the expert that does not show up in the expert's report because the party offering the expert considers the data work product. Before deposing an expert witness who prepared such a report, if the requirements of subdivision (b)(5) were applied, the deposing attorney should know the identity of everything the expert witness was shown. Logically, government contract judges have looked with favor on requests for the identification of all documents a party asserts are protected from discovery by the work product doctrine, since unless the documents are adequately identified so as to allow a determination of whether work product protection applies or not, the party requesting the documents would be completely at the mercy of the self-interested judgment of the party alleging work product protection. Without some form of identification, the judge would also be at a loss to know if the documents deserved work product protection.

IV. HOW GOVERNMENT CONTRACT FORUMS SHOULD RESOLVE THE CONFLICT

With federal court cases on both sides, and no government contract cases directly on point, government contract judges are relatively free to choose between protecting attorney work product shared with a testifying expert and ordering the full disclosure of such information. However, besides the case law favoring full disclosure, two additional considerations argue for choosing full disclosure: (1) the differences between expert witness testimony and fact witness testimony, as highlighted in the Federal Rules of Evidence;[251] and (2) the differences between testifying experts and nontestifying experts, as highlighted in the special protection given nontestifying experts under Federal Rule of Civil Procedure 26(b)(4)(B).

A. Expert Witness Testimony Versus Fact Witness Testimony

Though a fact witness and an expert witness both swear to tell the truth,[252] sit in the same witness chair, and testify in the same question-and-answer

[251] *Intermedics* recognizes the interrelationship between expert witness discovery and FED. R. EVID. 702, 703, and 705. *Intermedics* points out the Advisory Committee Note to FED. R. EVID. 705 highlights the critical nature of expert witness discovery in enabling an attorney to effectively cross-examine an expert witness. *Intermedics*, 139 F.R.D. at 394, citing *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980). *Gulf & Western Indus., Inc.* ASBCA No. 21090, 80-1 BCA ¶ 14,304, cites FED. R. EVID. 705 as a basis for expert witness discovery.

[252] Though as one trial practice author has pointed out, the oath might be more appropriately worded, "Do you swear to tell the truth, the whole truth, and nothing but the truth--except, of course, what your lawyer told you to say?" C. ANDERSON, NORTH CAROLINA TRIAL PRACTICE 314 (1996).

format,[253] the rules governing their testimony are significantly different. The differences in the rules governing their testimony lead to special considerations in the discovery process that precedes an expert witness's testimony at trial or hearing. The *Haworth* court, finding for the protection of opinion work product shared with an expert witness, argued the discovery-oriented authorities based "their decisions primarily upon the policy that the fact finder ought to know whether counsel's influence infected the expert's opinion."[254] The *Haworth* court then went on to say the Supreme Court protection of opinion work product (as enunciated in *Hickman* and *Upjohn*) was never intended to be pushed aside in order to provide for more effective cross-examination.[255] However, when the Supreme Court addressed the discovery of opinion work product in *Hickman* and in *Upjohn*, the Supreme Court was dealing with opinion work product shared with fact witnesses, not expert witnesses.

1. Differences in Knowledge

Before a fact witness is allowed to testify, the attorney proffering the witness's testimony must lay a foundation to show the witness has personal knowledge of the facts about which the witness will testify.[256] Even in the

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[253] Some judges may require expert testimony to be pre-filed, and the expert would then not testify in the same manner as a regular witness. The expert's pre-filed testimony would be substituted for direct examination; however, the expert witness would then be cross-examined and re-direct examined in the same manner as a regular fact witness.
[254] *Haworth*, 162 F.R.D. at 295.
[255] *Id.*
[256] FED. R. EVID. 602:

limited circumstances when a fact witness is allowed to testify in the form of an opinion, the witness's opinion must be based upon the witness's firsthand perceptions.[257] However, an expert witness does not have to have any firsthand knowledge of the facts in order to testify,[258] nor is the expert witness's opinion required to be based on the expert's own perceptions.[259] Consequently, though the bases of a fact witness's testimony might be

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Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. . . . This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

[257] FED. R. EVID. 701:

Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

[258] FED. R. EVID. 703:

Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Note the last sentence of FED. R. EVID. 602 (text at note 256) explicitly removes expert witnesses from the requirements of Rule 602, and applies the more liberal allowances of Rule 703 to experts.

[259] FED. R. EVID. 702:

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Note that FED. R. EVID. 701 (text at note 257) begins by saying "If the witness is not testifying as an expert. . .," removing expert witnesses from the requirements of Rule 701; and Rule 702 does not include the limitation in Rule 701 that the opinion be based on the witness's perception.

relatively easy to pinpoint, since under the rules of evidence the bases must rest on the witness's own personal perceptions, the bases of an expert witness's testimony are less ascertainable.

2. Differences in Bases of Testimony

A fact witness can be questioned about his or her perception of specific events. (Were you present when the widget was installed? How many feet from the pylon was the widget installed? Did you measure it? Was the widget installed straight up and down, or was it tilted? Which direction was it tilted?) At issue are the witness's perceptions and memory, both of which can be compared with the perceptions of other witnesses, with documents, with photographs, and with any other evidence related to the physical "scene" about which the witness has testified.

But an expert witness is not required to have observed the event or scene about which the expert is testifying. The expert's perception and memory of the event are not at issue. Instead, the expert witness is questioned about the bases for the expert's opinion,[260] and the quality of the knowledge or experience the expert called upon in forming the expert's opinions. Many

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[260] FED. R. EVID. 705:

> **Disclosure of Facts or Data Underlying Expert Opinion**
> The expert may testify in terms of opinions or inferences and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

times an expert witness receives his or her first "picture" of what happened from the party who hired the expert to testify.[261] All of the expert witness's information may come from attorneys, and an expert witness may have reviewed countless documents selected by attorneys, some of the documents even prepared specifically for litigation.[262] An expert witness has likely spent hours preparing to testify, warned about the various tricks the other side's lawyers will use to try to make the expert look stupid or change his or her opinion. After all the time spent with his or her side, the expert witness is likely to feel like part of "the team," perhaps giving the benefit of the doubt on any issues which might go either way to the side for whom the expert is working.[263]

3. Opinion Testimony

Generally, a fact witness does not get to testify "in the form of opinions or inferences. . . ."[264] Expert witnesses not only testify in the form of opinions, but experts may offer their opinions on the ultimate issues the finder of fact is struggling to resolve.[265] This allowance can make the testimony of the expert

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[261] *Karn*, 168 F.R.D. at 640.
[262] Mickus, *supra* note 18, at 788-89.
[263] *Id.* at 774; *Intermedics*, 139 F.R.D. at 396.
[264] FED. R. EVID. 701 (text at note 257).
[265] FED. R. EVID. 704.

> **Opinion on Ultimate Issue.** [T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. [With the exception of opinions regarding a criminal defendant's mental state.]

witness sound more like closing argument, or the arguments in a brief, than like direct examination. (Q: Was the widget installed too close to the pylon? A: Yes, it was. Q: Was the improper installation of the widget the cause of the project's failure to comply with the specifications? A: Yes.). Though it is easy for an expert to give a conclusion about an ultimate issue during direct examination, attacking that conclusion on cross-examination requires questions directed at the bases for the conclusions, not the conclusions themselves, and makes effective cross-examination dependent upon knowing everything the expert built his or her conclusions upon.

An expert witness may testify without giving the bases of the expert's opinion, leaving the cross-examiner to ferret them out.[266] Though in most instances an expert witness's opinion would be more persuasive if the expert shared the bases of the opinion on direct examination, there is no legal requirement for the expert to do so.

Also, the information upon which an expert's opinion is based need not be admissible in evidence in order for the expert to render an opinion based upon it.[267] The expert witness can give an opinion on an ultimate issue without stating the bases for the opinion during direct examination, and without the bases ever having to be admitted into evidence during the trial.

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[266] FED. R. EVID. 705 (text at note 260).
[267] FED. R. EVID. 703 (text at note 258); *Harrington Assoc., Inc.*, GSBCA No. 6986, 85-2 BCA ¶ 18,109 at 90,903-04.

4. Cross-examination

Given the sources of information which may underlie the testimony of an expert witness and the manner in which the rules allow an expert witness to testify, the cross-examination of an expert is much more dependent upon the discovery process than is the cross-examination of a fact witness.[268] Without disclosure of all the information the expert considered, including opinion work product, the cross-examiner is dependent on the expert witness to identify how and when the witness gained knowledge of certain facts, and how, when, and why the witness formed his or her opinions. But an expert witness who has been extensively prepared to testify, and who has received all of his or her data through lawyers, cannot possibly separate out all the influences affecting the expert's testimony. The trial lawyer who is accomplished at witness preparation leaves the witness unaware of any manipulation that occurred, and cross-examination regarding such subtle manipulation will not reveal it.[269]

Unlike the cross-examination of a fact witness, where the cross-examiner can measure the witness's testimony against a reconstructed event (comparing the witness's memory to that of other witnesses, documents, and common sense), the cross-examination of an expert witness does not have an "event" that can function as a benchmark. The foundation of the expert witness's

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[268] *Intermedics*, 139 F.R.D. at 394; *Karn*, 168 F.R.D. at 639.
[269] Mickus, *supra* note 18, at 793.

testimony was constructed by the party calling the expert; the foundation is not built upon firsthand perceptions, but upon "packaged" information, purposely selected and communicated to win the case.[270]

5. Witness Selection

Besides the differences in the rules for testifying and the breadth of their testimony, fact and expert witnesses take dissimilar paths to the witness stand. A fact witness is a witness by virtue of what the witness happened to perceive. Trials are efforts to reconstruct past events, and that reconstruction is accomplished through fact witnesses and documents. Fact witnesses are called to testify in order to provide the "puzzle-pieces" of fact put together to recreate a picture of the past. Though there may sometimes be multiple witnesses to an event, and an attorney may call only those who recall the facts in the way most favorable to his or her case, the attorney is still calling fact witnesses to testify based upon what the witnesses perceived.

An attorney's ability to choose fact witnesses is limited to those who perceived the event the attorney needs to reconstruct, and the attorney's choice not to call a fact witness is constrained by the knowledge that the opposing party may call the witness to testify anyway. Also, "[s]ince an ordinary fact witness is testifying about things he personally experienced, the

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[270] *Id.* at 788-89.

attorney is, to some extent, stuck with what the witness knows."[271] The perceptions of a fact witness are what they are. Certainly through witness preparation, an attorney can affect what a witness "remembers," but the attorney is still confined by the witness's perception of the facts, and the attorney's knowledge of what other witnesses perceived and what documents say.[272]

But with a testifying expert, the attorney gets to choose a witness who says what the attorney needs to win the case.[273] Testifying expert witnesses are paid to provide opinions at trial which support the theories of the party paying them.[274] If an attorney offered a fact witness thousands of dollars to testify in support of his or her case, it might be called "bribery;" but if an attorney does not attempt to purchase the best expert available, it might be called "malpractice."[275] Ten years ago, the ease with which a party could find an expert who could testify to support its side was already recognized, and bemoaned.[276] Today, finding an expert to support a party's theory at trial should even be easier, given development of the information superhighway.

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[271] Waits, *supra* note 10, at 397, n.48.
[272] Cohen, *Witness Preparation: How the Nature of Perception and Memory Directs the Process* (1996) (unpublished paper on file with the author). (Thought-provoking, though the author frequently exceeds the limits of his expertise).
[273] Mickus, *supra* note 18, at 789.
[274] *Id.* at 773.
[275] TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 459 (1983) (some formal ethical rules "expressly permit [a lawyer] to pay large sums of money to experts to induce them to testify for [them.]").
[276] TANFORD, *supra*, at 458.

Because expert testimony can be in the form of an opinion, and can be based upon data other than an expert witness's personal perceptions, the pool of potential expert witnesses is not limited like the pool of fact witnesses. An attorney can search until he or she finds an expert who will testify consistent with the attorney's theory of the case--the attorney is not limited to witnesses with firsthand knowledge of some event. So long as the attorney's theory can be effectively sold to the finder of fact (has some support in logic or emotion, and enough evidence to get it over any legal hurdles), the attorney only needs to find an expert witness who can provide an opinion consistent with the attorney's theory, and who can testify persuasively.

6. Requiring Disclosure Addresses the Differences Between Expert Witnesses and Fact Witnesses

Requiring disclosure of all communications an attorney has with his or her testifying expert would not alter the expert's advocate nature. The expert will still have gone through a selection process: experts who do not have an opinion that will help sell a party's case are not going to be identified by the party as testifying experts.[277] However, disclosure would allow the bases of the expert witness's opinions to be more effectively explored on cross-examination. Without broad discovery of the information given to an opponent's expert, it is harder to depend upon cross-examination to counter

[277] "[A]n attorney's decision to use a particular expert as a trial witness indicates that the expert's opinion embodies favorable information." Mickus, *supra* note 18, at 784.

what the expert says on direct. The only means left to a party to counteract an opponent's expert witness is for the party to call its own expert witness.[278]

But if the cross-examining attorney had all the information shared with the expert witness, the cross-examining attorney would have the equivalent of the fact witness "event" to which to compare the expert witness's testimony. The cross-examining attorney would be able to explore how the expert's interaction with the expert's "team" related to the development of the expert's opinions, and even though the expert witness may not be able to identify where the expert's opinions may have been influenced by the expert's team, the cross-examining attorney would be able to present arguments to the finder of fact about points where the expert's opinions are less driven by an area of expertise than by the influence of the party hiring the expert.[279]

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[278] *Haworth* recognizes this. The court says if a cross-examiner does not have access to the opinion work product given to the expert witness in order to cross-examine the expert regarding how the expert's opinion may have been influenced by the opinion work product, the cross-examiner can still show the expert's opinion is unreasonable by measuring it against the opinions of other experts. *Haworth*, 162 F.R.D. at 295-96.

[279] Though smart trial lawyers recognize good witness preparation does not use overt suggestion. Telling an expert "I need you to find X" risks alienating the expert or creates an opinion the expert will not be able to support, even if the lawyer's direction to "find X" is protected from discovery. Instead, effective trial lawyers prepare an expert witness by telling the expert right up front they want the expert to tell them the truth, and for the expert not to worry about what might help or hurt the lawyer's case. The beginning of witness preparation might sound like this: When you get on the stand during cross-examination and the other side asks you how you reached your conclusions, you must be able to say, "By applying what I've learned in my field of expertise to all the facts." And when they ask you what your lawyer told you, you'll be able to say, "My lawyer told me to just find the truth, because whatever the truth is, it is. And that's exactly what I did." The expert witness does not need to be told he or she will not be hired if the witness's opinion is not helpful. The expert is not stupid. The message the lawyer communicates to the expert is that if the expert cannot sit on the stand and testify without reservation to an opinion favorable to the lawyer's case, the expert should speak up now--so the lawyer can find another expert.

B. Testifying Expert Versus Nontestifying Expert

Many of the "new" rules cases represent logical, interpretative arguments of what the "new" rules mean, built upon a history of cases supporting the differing philosophies of work product protection and disclosure of information used to develop an expert witness's testimony. However, identifying what the "new" rules say about the discovery of information shared with testifying experts is easier if the focus of the question is expanded to include an examination of what the "new" rules say about nontestifying experts, as well. The cases addressing the protection of work product shared with an expert witness have necessarily focused on the protection of testifying expert information, since the genesis of each case was a specific question aimed at discovering material shared with a testifying expert, not a nontestifying one. But the contrast between the nature of nontestifying experts and testifying experts, and the differing protection afforded each, better illuminates the intent of the "new" rules to provide disclosure of materials shared with testifying experts.[280]

[280] An expert's role--testifying or nontestifying--makes all the difference in the level of protection given work product communications between the expert and attorneys. *B.C.F. Oil*, 171 F.R.D. at 62, citing *Detwiler*, 124 F.R.D. at 546, and *Beverage Mktg.*, 563 F.Supp. at 1014.

1. The Nature of the Nontestifying Expert

Nontestifying experts allow a party to "test" the party's theories of the case, and to develop a trial strategy.[281] They allow a party to prepare for cross-examination of the other side's testifying experts.[282] One commentator compares the nontestifying expert's role regarding the facts and science to the legal associate's role regarding the law: the associate presents the legal research bearing on the case strategy, while the nontestifying expert analyzes the scientific or factual soundness of a party's position.[283]

With a testifying expert, information is shared between the attorney and the expert, and then the shared information is packaged for maximum persuasive effect and presented by the expert to the finder of fact. The attorney shares work product information with a testifying expert to prepare the expert to testify effectively for the attorney at trial.[284] The work product information may provide tips on how to testify convincingly ("Use simple language, maintain eye-contact, answer only the question asked, ..."), an explanation of where the expert's testimony fits in the theory of the case ("In order to prove design defect, we will use your testimony to show . . . ."), a summary of

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[281] Mickus, *supra* note 18, at 773 (though Mickus is talking about the use of experts in general, the uses he covers regarding formulation of case theories and strategy are uses of a nontestifying expert).
[282] TANFORD, *supra* note 275, at 439.
[283] Mickus, *supra* note 18, at 783.
[284] Mickus says a lawyer gives work product to his expert witness for "only two purposes: to inform the expert regarding factual aspects of the litigation that might affect the expert's opinion, or to influence or prompt the expert to adhere to an opinion that favors counsel's theory of the case." Mickus, *supra* note 18, at 785. Both of Mickus's purposes are prongs of the key purpose of preparing the expert to testify so that the side calling the expert wins.

the key evidence in the case (such as a chronology, or list of key documents), and an analysis of the other side's case ("They're going to argue . . . ."), but it is all shared with an eye toward created winning testimony.

With a nontestifying expert, information is only shared between the attorney and the expert. Unless there is a chance the nontestifying expert will be converted to a testifying expert later, the attorney is not concerned with making the nontestifying expert a good witness, but with using the nontestifying expert's expertise to test whether what the attorney intends on presenting at trial has any weaknesses. The nontestifying expert is asked to examine "the factual or scientific soundness of the attorney's theory regarding facts of legal significance in the case."[285]

2. Protection Given Information Shared With a Nontestifying Expert

Federal Rule of Civil Procedure 26(b)(4)(B) protects information shared with nontestifying experts from discovery.[286] Four interests have been recognized as protecting information shared with nontestifying experts: (1) the preservation of free-wheeling exchange between attorneys and consultants in evaluating and presenting positions at trial, without fear their discussions could be used against them; (2) not allowing one party to take advantage of

[285] Mickus, *supra* note 18, at 783.
[286] See note 24 for the text of "new" FED. R. CIV. P. 26(b)(4)(B). "New" subdivision (b)(4)(B) is essentially the same as "old" subdivision (b)(4)(B). See note 196 for the text of "old" FED. R. CIV. P. 26(b)(4)(B).

the cost and effort of the other party's case preparation by discovering details of the case preparation from the party's consultant; (3) encouraging experts to act as consultants by not allowing their testimony to be compelled; and (4) eliminating the extreme prejudice to a party hiring a consultant which would exist if the consultant later testified for the opposing party.[287]

The board in *Adelaide* recognized the protections of "new" Rule 26(b)(4)(B) prevented a party from calling an opposing party's nontestifying expert as a witness, even when the nontestifying expert had initially been designated as a testifying witness.[288] The board said protecting nontestifying experts from discovery would encourage each party to prepare its own case, instead of allowing a party to take advantage of its opponent's preparation, and would keep a party from being able to discover its opponent's trial strategy through a nontestifying expert.[289] The board also found protecting a nontestifying expert would keep one party from being able to use the expertise of its opponent's expert "without having to underwrite the initial costs or long-range expense of retaining or consulting with that expert."[290]

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[287] *House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236, 241 (N.D.Iowa 1996), *citing Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458, 460 (S.D.N.Y. 1995).
[288] *Adelaide*, 96-1 BCA at 141,142.
[289] *Id.*, citing 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2032 at 445 (2d ed. 1994).
[290] *Id.*, citing *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F.Supp. 1122, 1138 (S.D.Tex. 1976).

Though a party might waive work product protection under Rule 26(b)(3) (for example, by a nontestifying expert sharing work product with an opponent), waiver has been found not to apply under the protection of Rule 26(b)(4)(B) since the rule exists to keep a party from taking advantage of its opponent's hard work.[291] Rule 26(b)(4)(b) does allow discovery from nontestifying experts "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."[292] But a showing of exceptional circumstances is hard to make, and is traditionally found when a nontestifying expert destroys or alters a unique sample in testing, leaving the opposing party with no means of running its own tests.[293]

In *Hubbs*, the board said the "exceptional circumstances" test is met when the party seeking discovery lacks the ability to discover information equivalent to that sought.[294] *Hubbs* goes on to say:

> If a party can itself conduct tests which have been conducted by a non-testifying expert of the opponent, then normally there will be no "exceptional circumstances" which Rule 26(b)(4)(B) requires as a prerequisite to mandatory revelation during discovery.[295]

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[291] Kelleher, *supra* note 62, at 107, citing *Vanguard v. Banks*, 1995 WL 71293 at 3 (E.D.Pa. 1995). Keep in mind that the use of nontestifying expert materials by a testifying expert is another matter, as those materials might then be found to be part of the discoverable bases of the testifying expert's opinions. See *Donald C. Hubbs, Inc.*, DOTCAB Nos. 2012 *et al.*, 89-2 BCA ¶ 21,740, discussed above in section II.B.4.a.
[292] FED. R. CIV. P. 26(b)(4)(B) (text at note 24).
[293] *Braun v. Lorillard, Inc.*, 84 F.3d 230, 235-36 (7th Cir. 1996).
[294] *Hubbs*, 89-2 BCA at 109,403, citing *Eliasen*, 111 F.R.D. at 401.
[295] *Id.*

Hubbs does allow discovery of the identity of nontestifying experts who are retained or employed in anticipation of litigation, as the identity of nontestifying experts is important in allowing the requesting party to determine the status of the experts for purposes of discovery (for example, determining whether they were informally consulted or specially employed, or whether they were employed in anticipation of litigation).[296] But disclosure of the identity of a nontestifying expert is not the same as disclosure of the information shared with the nontestifying expert.

Even discovery-oriented courts recognize communications with nontestifying experts should receive the utmost protection. In fact, the protection given nontestifying experts is one of the bases supporting broad discovery regarding testifying experts. Addressing the argument that allowing discovery of work product shared with a testifying expert would inhibit attorneys "from having uninhibited, freewheeling interchanges with their expert witnesses," *Karn* cites Rule 26(b)(4)(B) as preserving such communications with nontestifying experts.[297] *Intermedics* says that allowing broad discovery of testifying experts would not eliminate an attorney's ability to have conversations including work product with experts, but would instead require the conversations to be with nontestifying experts--unless a party was "willing to disclose the contents of the conversations."[298]

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[296] *Id.* at 109,401-02.
[297] *Karn*, 168 F.R.D. at 640.
[298] *Intermedics*, 139 F.R.D. at 393.

The Federal Rules of Evidence treat expert witnesses differently from "normal" witnesses, and the Federal Rules of Civil Procedure treat testifying experts differently from nontestifying experts. In both instances, the differing treatment recognizes key characteristics of expert witnesses that define how they are used at trial--and why discovery of information shared with testifying experts should be different than discovery of information shared with fact witnesses or nontestifying experts.

CONCLUSION

Even before the 1993 Amendments changed Federal Rule of Civil Procedure 26, the battle between the full disclosure of information shared with an expert witness and the protection of attorney work product had eloquent supporters on each side. After the 1993 Amendments, the reasoning of those favoring protection has become somewhat strained, as they have had to search for logical interpretations of language that favors disclosure.

Though the government contract forums are not bound by the Federal Rules of Civil Procedure, they have used them as a guide, and even under the "old" rules, have leaned toward disclosure over protection on issues similar to expert witness discovery issues. Ironically, requiring full disclosure of information considered by an expert witness may cause parties to hire only

those expert witnesses who understand the subtle language of witness preparation, who appreciate nuance and unspoken communication, and who do not require the party paying them to spell out what the party wants from them--perhaps resulting in a form of "natural selection" where only the craftiest experts survive to be chosen to testify. But given the changes to "new" Rule 26; the reasoning of the "new" rules federal cases; and the differences between expert and fact witnesses, and the protection afforded testifying and nontestifying experts, government contract forums should resolve the conflict by ordering full disclosure.

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